1-596

Dec 14 '75, Argd. & Affd ayes

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~801~~. 82

GILBERT WOODRUFF, HORACE BROWN, AND GEORGE S. HASKELL, PLAINTIFFS IN ERROR,

vs.

BENJAMIN F. HOUGH, JOSEPH R. HOUGH, AND THOMAS H. BUTLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 23, 1873.

40

1 Thompson & Lewis - ~~40~~ 47

1 Woods & Rob 135

# SUPREME COURT OF THE UNITED STATES.

## No. 301.

GILBERT WOODRUFF, HORACE BROWN, AND GEORGE S. HASKELL, PLAINTIFFS IN ERROR,

vs.

BENJAMIN F. HOUGH, JOSEPH R. HOUGH, AND THOMAS H. BUTLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.


| | Original. | Print |
|---|---|---|
| Præcipe for summons | 2 | 1 |
| Bond for costs | 3 | 1 |
| Summons and return | 4 | 2 |
| Declaration | 7 | 2 |
| Pleas of defendants | 43 | 13 |
| Demurrer to pleas | 69 | 22 |
| Order of court sustaining demurrers | 72 | 23 |
| Order of court impaneling jury, etc | 72 | 23 |
| Orders of court on trial | 73, 78 | 25 |
| Bill of exceptions | 79 | 25 |
| Judge's charge | 112 | 36 |
| Bond | 126 | 42 |
| Certificate to transcript | 128 | 42 |
| Writ of error | 129 | 43 |
| Citation | 131 | 43 |
| Assignment of errors | 133 | 44 |

1 In the circuit court of the United States, northern district of Illinois, ss:

Pleas in the circuit court of the United States in and for the northern district of Illinois, before the Hon. Henry W. Blodgett, district judge, and on Wednesday, the eighth day of January, A. D. one thousand eight hundred and *and* seventy-three, and of the Independence of the United States the 97th year.

BENJAMIN F. HAUGH, JOSEPH R. HAUGH, AND Thomas H. Butler
*v.*
GILBERT WOODRUFF, HORACE BROWN, AND George S. Haskill.
} Assumpsit.

Be it remembered that, on the sixth day of August, A. D. 1872, the said plaintiffs, by their attorneys, filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois their precipe for summons and bond for costs, which read in the
2 words and figures following, to wit:

*Precipe for summons.*

STATE OF ILLINOIS,
*Northern district of Illinois:*

In the United States circuit court for the northern district of Illinois.

BENJAMIN F. HAUGH, JOSEPH R. HAUGH, AND Thomas H. Butler
*v.*
GILBERT WOODRUFF, HORACE BROWN, AND George S. Haskill.
} Assumpsit. Damages, $15,000.

The clerk of said court will issue a summons in the above-entitled cause to said defendants, in a plea of trespass on the case on promises, to the damage of the said plaintiffs in the sum of fifteen thousand dollars, direct the same to the marshal of the said district to execute, and make it returnable to the October term of said court, A. D. 1872.

JEWETT & ADAMS,
*Plaintiffs' Attorneys.*

CHICAGO, *Aug.* 6, 1872.

3 (Endorsed:) Filed Aug. 6th, 1872. W. H. Bradley, clerk.

*Bond for costs.*

UNITED STATES OF AMERICA,
*Northern district of Illinois, ss:*

Circuit court, Oct. term, A. D. 1872.

BENJ. F. HAUGH ET AL.
*v.*
GILBERT WOODRUFF ET AL.
} Assumpsit.

I enter myself security for costs in this cause, and promise to pay all

costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, hereby agree and stipulate that execution may issue against my property for any costs taxed against them.

Dated this 6th day of August, A. D. 1872.

JNO. W. JEWETT.

(Endorsed:) Filed Aug. 6th, 1873. W. H. Bradley, clerk.

4 *Summons.*

Circuit court of the United States of America, northern district of Illinois.

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Gilbert Woodruff, Horace Brown, and George S. Haskill, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Benjamin F. Haugh, Joseph R. Haugh, and Thomas H. Butler, of a plea of trespass on the case upon promises, to their damages, as it is alledged, of fifteen thousand dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 6th day of August, in the year of our Lord one thousand eight hun-

5 dred and seventy-two, and of our Independence the 97th year.

[L. S.] W. H. BRADLEY, *Clk.*

*Marshal's return.*

I served the within writ upon George S. Haskell, therein named, by reading the same to him, and in his presence and hearing, on the 29th day of August, A. D. 1872; and upon Gilbert Woodruff, therein named, by reading the same to him, and in his presence and hearing, on the 28th day of August, A. D. 1872. But I have not served Horace Brown, therein named, as I have not been able to find him in my district.

B. H. CAMPBELL,
*U. S. Marshal,*
By L. O. GILMAN, *Deputy.*

Filed Oct. 11th, 1872. W. H. Bradley, clerk.

6 And thereupon, afterwards, to wit, on the 20th day of September, A. D. 1872, the plaintiffs filed their declaration against said defendants, which reads in the words and figures following, to wit:

7 UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

In the circuit court of the United States for the northern district of Illinois. October term, A. D. 1872.

In this action, Benjamin F. Hough, Joseph R. Hough, and Thomas

H. Butler, all citizens of the city of Indianapolis, in the State of Indiana, plaintiffs, by Jewett & Adams, their attorneys, complain of Gilbert Woodruff, Horace Brown, and George S. Haskill, all citizens of the city of Rockford, in the State of Illinois, defendants, summoned, &c., of a plea of trespass on the case on promises.

For that whereas heretofore, to wit, on the 18th day of July, A. D. 1871, at, to wit, the northern district of Illinois aforesaid, in consideration that the said plaintiffs, at the special instance and request of the said defendants, would then and there make a certain agreement in writing, bearing date the day and year last aforesaid, with one John Allen, and which said agreement in writing is in the words and figures following, to wit:

8 "Memorandum of an agreement made and entered into this eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy-one, between Benjamin F. Hough, Joseph R. Hough, and Thomas H. Butler, copartners, under the name and style of "Hough & Co.," of Indianapolis, Indiana, party of the first part, and John Allen, of the city of Rockford, Illinois, party of the second part.

"Whereas the said John Allen, on the 5th day of July, A. D. 1871, entered into an agreement with the board of supervisors of the county of Winnebago, in said State of Illinois, to erect and complete a jail-building for said county of Winnebago, to be located on the court-house square in said city of Rockford, and to be completed by the first day of April, A. D. 1872, and to be built according to the plans and specifications prepared by Cass Chapman, an architect of Chicago, Illinois, one copy of which is now in the possession of the building committee of said board of supervisors in charge of the construction of said jail, and a copy of which, so far as they extend to the wrought-iron work for said jail, has been furnished to the party of the first part; and whereas
9 the said party of the second part is desirous of having the said party of the first part do the wrought-iron work for said jail, and enter into an agreement in that behalf:

"Now, therefore, this agreement witnesseth that the said party of the first part, in consideration of the sum of money to be paid to them by the party of the second part, as hereinafter provided, do hereby promise and agree to and with the said party of the second part, that they will furnish the material for, manufacture, deliver and erect, in its proper position, all of the wrought-iron work for the aforesaid jail, mentioned and provided for in the aforesaid plans and specifications under the caption of "specifications for wrought-iron work," and that they will furnish and erect the same as fast as the said jail-building shall be ready to receive the same, and they shall have had fifteen days' notice, in writing, of such readiness.

"And the said party of the second part promises and agrees to pay to the said party of the first part, for the wrought-iron work aforesaid, the sum of nine thousand one hundred and fifty dollars, ($9,150,)
10 and to pay the same in four equal payments, as the work progresses, reserving twenty per cent. of each installment until the completion of said jail-building; that is to say, when one fourth of said iron-work shall be completed, there shall be paid one-fourth of the aforesaid sum of nine thousand one hundred and fifty dollars, less twenty per cent. of said fourth, and thereafter, upon the completion of each successive one-fourth of said iron-work, there shall be paid a one-

fourth of the aforesaid sum of nine thousand one hundred and fifty dollars, less twenty per cent. of such fourth, until the whole iron-work is completed; and when said jail-building shall be completed, the remainder of said sum of nine thousand one hundred and fifty dollars (including said reserved twenty per cent.) shall be fully paid.

"And it is mutually agreed by and between the parties hereto that, if the aforesaid building committee shall make any changes in the material or construction of the aforesaid iron-work, then, and in that case, the said party of the first part, upon receiving reasonable notice, shall do said iron-work in accordance with such changes; and if such
11 changes shall increase the cost of said work, then such additional cost, to be computed in proportion to the above-mentioned price for the whole, shall be allowed and paid to the party of the first part; but, if such changes shall decrease the cost of said work, then the party of the second part shall be allowed the amount of such decrease, to be computed as aforesaid.

"In witness whereof the said parties have hereunto set their hands the day and year first above written, in duplicate.

"B. F. HOUGH.
"JOS. R. HOUGH.
"T. H. BUTLER.
"JOHN ALLEN."

They, the said defendants, then and there undertook, promised, and agreed to and with the said plaintiffs to guarantee the faithful performance of the said agreement in writing on the part of the said John Allen; and the said plaintiffs aver that they, confiding in the said promise, undertaking, and agreement then and there made by the said defendants as aforesaid, did then and there make the said agreement in writing with the said John Allen; and the said defendants, in con-
12 sideration of the making of the said agreement in writing with the said John Allen by the said plaintiffs as aforesaid, did then and there affix in writing to the said agreement in writing so made by the said plaintiffs with the said John Allen, their guarantee of the faithful performance of the said agreement on the part of the said John Allen, in the words and figures following, to wit:

"In consideration of the making of the foregoing agreement by the said Benjamin F. Hough, Joseph R. Hough, and Thomas H. Butler, we, Gilbert Woodruff, Horace Brown, and George S. Haskill, of the city of Rockford, Illinois, do hereby guarantee the faithful performance of the said agreement on the part of the said John Allen.

"Witness our hands this 18th day of July, A. D. 1871.

"GILBERT WOODRUFF,
"HORACE BROWN,
"GEO. S. HASKILL."

And the said plaintiffs aver that they, confiding in the said guarantee in writing so made by the said defendants as aforesaid, did afterwards, to wit, on the 1st day of May, A. D. 1872, at, to wit, the northern district of Illinois aforesaid, in pursuance of the said agreement in writ-
13 ing with the said John Allen, so made by them as aforesaid, furnish the material for manufacture, and deliver all of the wrought-iron work for the jail-building in the said agreement in writing described, and did erect in its proper position a part of the *of the* said wrought-iron work, to wit, one-half part, and did furnish and erect the same as fast as the said jail-building was ready to receive the same; and they, the said plaintiffs, had fifteen days' notice in writing of such readiness.

And the said plaintiffs further aver that all of the wrought-iron work so furnished, manufactured, and delivered by them as aforesaid was in material and construction, and in every other particular, as mentioned and provided for in certain plans and specifications prepared for the construction of said jail-building by Cass Chapman, architect, under the caption of "Specifications for wrought-iron work," as specified in said agreement, save that in so far as the building committee of the board of supervisors of the county of Winnebago made changes in the material or construction thereof, and these plaintiffs had reasonable notice of such changes, the said iron-work was made in accordance with such changes.

14 And the said plaintiffs further aver that the part of said wrought-iron work, to wit, one-half part erected by them in its proper position in the said jail building as aforesaid, was erected as mentioned and provided for in certain plans and specifications prepared for the construction of said jail-building by Cass Chapman, architect, under the caption of "Specifications for wrought-iron work," as specified in said agreement in writing with the said John Allen, save that in so far as the building committee of the board of supervisors of the county of Winnebago made changes in the material and construction of said wrought-iron work, and these plaintiffs have reasonable notice of such changes, the said iron-work was erected in accordance with such changes.

And the said plaintiffs further aver that all of the wrought-iron work so furnished, manufactured, and delivered by them as aforesaid, was furnished, manufactured, and delivered, and the part of the said iron-works, to wit, one-half part so erected by them as aforesaid was erected in all respects in accordance with the tenor and effect, true intent, and meaning of the conditions, provisions, and agreements in the said agreement in writing in that behalf contained.

15 And the said plaintiffs further aver that on or about, to wit, the 1st day of May, A. D. 1872, at, to wit, the northern district of Illinois aforesaid, they were ready and willing, and offered to the said John Allen to erect in its proper position, in accordance with the provisions, conditions, and agreements in the said agreement in writing in that behalf contained, the remainder of the said wrought-iron work so manufactured and delivered by them as aforesaid which had not then been erected by these plaintiffs, and to complete the whole of the said wrought-iron work in pursuance of the said agreement in writing; yet the said John Allen, although the said jail-building was ready to receive the said wrought-iron work, did not, nor would suffer or permit the said plaintiffs to proceed to complete the said wrought-iron work, but would wholly hinder and prevent*ed* them from so doing, and then and there wrongfully discharged the said plaintiffs from any further performance of their said agreement in writing so made with him, the said John Allen as aforesaid, of all which premises the said defendants afterwards had notice, to wit, on the day and year last aforesaid at, to wit, the northern district of Illinois aforesaid.

16 And the said plaintiffs further aver that the said John Allen, although often requested so to do, has not paid to them or either of them the sum of nine thousand one hundred and fifty dollars, which said sum he agreed, in the said agreement in writing so guaranteed by the said defendants as aforesaid, to pay them, the said plaintiffs, for the wrought-iron work of the said jail-building provided for in the said agreement or any part thereof, but to pay the same or any part thereof has hitherto wholly neglected and refused, of all which premises the

said defendants had notice, to wit, on the 1st day of August, A. D. 1872, at, to wit, the northern district of Illinois aforesaid, and were required by the said plaintiffs to perform and fulfil their aforesaid guarantee of the faithful performance of the said agreement in writing on the part of the said John Allen, and to pay to the said plaintiffs the said sum of nine thousand one hundred and fifty dollars, according to the tenor and effect, true intent, and meaning of their aforesaid guarantee in writing, in that behalf made by them as aforesaid.

17 Yet the said defendants, not regarding their said guarantee in writing, but contriving and fraudulenting intending to deceive and defraud the said plaintiffs in this behalf, have not paid the said sum of nine thousand one hundred and fifty dollars to the said plaintiffs, although often requested so to do, but to pay the same or any part thereof to the said plaintiffs or either of them have hitherto wholly neglected and refused, and still do refuse, contrary to the tenor and effect, true intent, and meaning of their said guarantee in writing in that behalf made by them as aforesaid at, to wit, the northern district of Illinois aforesaid.

And whereas also the said defendants heretofore, to wit, on the 18th day of July, A. D. 1871, at, to wit, the northern district of Illinois aforesaid, in consideration that the said plaintiffs, at the special instance and request of the said defendants, would make and enter into a certain other agreement in writing with one John Allen, bearing date the day and year last aforesaid, in and by which said agreement in writing, after reciting that the said John Allen had entered into an agreement with the board of supervisors of the county of Winnebago, in the State of Illinois, on the 5th day of July, A. D. 1871, to erect and complete a

18 jail-building for said county of Winnebago, to be located on the court-house square in the city of Rockford in said State of Illinois, to be completed on the 1st day of April, A. D. 1872, and to be built according to certain plans and specifications prepared by Cass Chapman, an architect of Chicago, one copy of which was then in the possession of the building committee of said board of supervisors in charge of the construction of said jail, and a copy of which, so far as they extended to the wrought-iron work for said jail, have been furnished to the said plaintiffs, and that the said John Allen was desirous of having the said plaintiffs do the wrought-iron work for said jail and enter into an agreement in that behalf, it was witnessed that the said John Allen, in consideration that the said plaintiffs thereby promised and agreed to furnish the material for, manufacture, deliver, and erect in its proper position all of the wrought-iron work for the aforesaid jail mentioned and provided for in the aforesaid plans and specifications under the caption of "Specifications for wrought-iron work," and to furnish and erect the same as fast as the said jail-building should be ready to receive

19 the same, and they, the said plaintiffs, had fifteen days' notice in writing of such readiness, did promise and agree to pay to the said plaintiffs, for the wrought-iron work aforesaid, the sum of nine thousand one hundred and fifty dollars, ($9,150,) and to pay the same in four equal payments as the work progresses, reserving twenty per cent. of each installment until the completion of said jail-building, that is to say, to pay one-fourth of said sum of nine thousand one hundred and fifty dollars, less twenty per cent. of said fourth, when one-fourth of the said iron-work was completed, and thereafter, upon the completion of each successive one-fourth of said iron work to pay one-fourth of said sum of nine thousand one hundred and fifty dollars, less twenty per sent. of such fourth, until the whole iron-work was completed, and when

said jail-building was completed to pay the remainder of said sum of nine thousand one hundred and fifty dollars, including said reserved twenty per cent.; and further, that the said plaintiffs and the *said plaintiffs and the* said John Allen did mutually agree that if the aforesaid building committee made any changes in the material or construction of the aforesaid iron-work, then and in that case the said plaintiffs, upon receiving reasonable notice, should do such iron-work in accordance with such changes, and that if such changes should increase the cost of said iron-work, then such additional cost, to be computed in proportion to the before-mentioned price, should be allowed and paid to the plaintiffs aforesaid, but if such changes should decrease the cost of said iron work, then the said John Allen should be allowed the amount of such decrease, to be computed as aforesaid, they, the said defendants, then and there undertook, promised and agreed to and with the said plaintiff to guarantee the faithful performance of the said agreement in writing on the part of the said John Allen.

And the said plaintiffs aver that they, relying upon the said promise, undertaking, and agreement of the said defendants so made by them as aforesaid, did afterwards, to wit, on the day and year last aforesaid, at, to wit, the northern district of Illinois, make and enter into the said agreement in writing with the said John Allen, and the said defendants, in consideration of the making of the said agreement in writing by the said plaintiffs with the said John Allen, did then and there affix to the said agreement in writing with the said John Allen, so made by these plaintiffs as aforesaid, their written guarantee of the faithful performance of the said agreement in writing on the part of the said John Allen in the words and figures following, to wit:

"In consideration of the making of the foregoing agreement by the said Benjamin F. Haugh, Joseph S. Haugh, and Thomas H. Butler, we, Gilbert Woodruff, Horace Brown, and George S. Haskill, of the city of Rockford, Illinois, do hereby guarantee the faithful performance of the said agreement on the part of the said John Allen.

"Witness our hands this 18th day of July, A. D. 1871.

"GILBERT WOODRUFF.
"HORACE BROWN.
"GEO. S. HASKILL."

And the said plaintiffs further aver that they, relying upon the said written guarantee of the said defendants so made by them as aforesaid, did afterwards, to wit, on the 1st day of May, A. D. 1872, at, to wit, the northern district of Illinois aforesaid, in pursuance of the terms of the said agreement in writing with the said John Allen, furnish the material for manufacture, deliver, and erect in its proper position a portion of the wrought iron work, to wit, one-half part, for the jail-building in the said agreement described, as mentioned and provided for in certain plans and specifications prepared for the construction of said jail-building by Cass Chapman, architect, under the caption of "Specifications for wrought-iron work," save that in so far as changes were made in the material or construction of the aforesaid iron-work by the building committee of the board of supervisors of the county of Winnebago, and these plaintiffs had reasonable notice of such changes, they did do such iron-work in accordance with such changes, and they did furnish and erect the same as fast as the said jail-building was ready to receive the same, and they, the said plaintiffs, had fifteen days' notice in writing of such readiness, and in general did complete the said portion of the wrought-iron work, to wit, one-half part, in accordance with the

tenor and effect, true intent, and meaning of the terms, conditions,
23 provisions, and agreements in the said agreement in writing with the said John Allen, made by them as aforesaid, in that behalf contained.

And the said plaintiffs further aver that afterwards, to wit, on or about the first day of May, A. D. 1872, at, to wit, the northern district of Illinois aforesaid, in pursuance of the said agreement in writing with the said John Allen, they did furnish the material for manufacture and deliver the remainder of the wrought-iron work for the aforesaid jail-building which had not been delivered and erected by them as aforesaid, and did furnish, manufacture, and deliver the same as mentioned and provided for in certain plans and specifications prepared for the construction of said jail by Cass Chapman, architect, under the caption of "Specifications for wrought-iron work," save that these plaintiffs did make such changes in the material and construction of the said iron-work as they were advised upon reasonable notice by the building committee of the board of supervisors of the county of Winnebago to make,
and they did furnish the same as fast as the said jail-building was
24 ready to receive the same, and they, the said plaintiffs, had fifteen days' notice in writing of such readiness, and in general did furnish, manufacture, and deliver the said remainder of the said wrought-iron work in accordance with the tenor and effect, true intent, and meaning of the conditions, provisions, and agreements in the said agreement in writing with the said John Allen made by them as aforesaid, in that behalf contained.

And the said plaintiffs further aver that afterwards, to wit, on or about the 1st day of May, A. D. 1872, at, to wit, the northern district of Illinois aforesaid, they were ready and willing, and offered to the said John Allen, to erect in its proper position the remainder of the wrought-iron work for the said jail-building which had not been erected by them as aforesaid, in accordance with the terms, conditions, provisions, and agreements in the said agreement in writing with the said John Allen in that behalf contained, and to complete the whole of the said iron-work in *the* pursuance of the said agreement in writing so made by them with the said John Allen as aforesaid.

25 Yet the said John Allen, although the said jail-building was ready to receive the said iron-work, and he, the said John Allen, had notified these plaintiffs of such readiness, did not, nor would suffer or permit the said plaintiffs to erect the remainder of the wrought-iron work, and complete the said wrought-iron work for the said jail-building as aforesaid, but would wholly hinder, and did then and there prevent them from so doing, and then and there wrongfully discharged the said plaintiffs from any further performance of their said agreement in writing, so made with him, the said John Allen, as aforesaid, of all which premises the said defendants afterwards, to wit, on or about the day and year last aforesaid, at, to wit, the northern district of Illinois, aforesaid, had notice.

And the said plaintiffs further aver that the said John Allen has not yet paid to the said plaintiffs, although often requested so to do, the sum of nine thousand one hundred and fifty dollars, ($9,150.00,) the sum he, the said John Allen, agreed to pay to these plaintiffs for the wrought-iron work aforesaid, in the said agreement in writing so guaran-
26 teed by the said defendants as aforesaid, or any part thereof, but to pay the same, or any part thereof, to these plaintiffs, or either of them, has hitherto wholly refused, of all which premises the said defendants had notice on, to wit, the 1st day of August, A. D. 1872, at, to

wit, the northern district of Illinois, aforesaid, and were required by the said plaintiffs to perform their aforesaid written guarantee part of the faithful performance of the said agreement in writing on the part of the said John Allen, and to pay to them, the said plaintiffs, the said sum of nine thousand one hundred and fifty dollars, according to the tenor and effect, true intent, and meaning of the said written guarantee so made by the defendants as aforesaid.

Yet the said defendants, not regarding their said written guarantee, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiffs in this behalf, have not, nor has either of them, paid to the said plaintiffs, or either of them, the said sum of nine thousand one hundred and fifty dollars, or any part thereof, but to pay the same, or any part thereof, have hitherto wholly neglected and
27 refused, and still do refuse, contrary to the tenor and effect, true intent, and meaning of their said written guarantee in that behalf so made by them as aforesaid, at, to wit, the northern district of Illinois aforesaid.

And whereas, also, heretofore, to wit, on the eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy-one, at, to wit, the northern district of Illinois aforesaid, in consideration of the making then and there by the said plaintiffs, at the special instance and request of the said defendants, of a certain other agreement in writing, bearing date the day and year last aforesaid, with one John Allen, and which said agreement in writing is in the words and figures following, to wit:

"Memorandum of an agreement made and entered into this eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy-one, between Benjamin F. Haugh, Joseph R. Haugh, and Thomas H. Butler, copartners, under the name and style of "Haugh & Co.," of Indianapolis, Indiana, party of the first part, and John Allen, of the city of Rockford, Illinois, party of the second part.

28 "Whereas the said John Allen, on the 5th day of July, A. D. 1871, entered into an agreement with the board of supervisors of the county of Winnebago, in said State of Illinois, to erect and complete a jail-building for said county of Winnebago, to be located on the court-house square in said city of Rockford, and to be completed by the first day of April, A. D. 1872, and to be built according to the plans and specifications prepared by Cass Chapman, an architect, of Chicago, Illinois, one copy of which is now in the possession of the building committee of said board of supervisors in charge of the construction of said jail, and a copy of which, so far as they extend to the wrought-iron work for said jail, has been furnished to the party of the first part; and whereas the said party of the second part is desirous of having the said party of the first part do the wrought-iron work for said jail, and enter into an agreement in that behalf.

"Now, therefore, this agreement witnesseth that the said party of the first part, in consideration of the sum of money to be paid to them by the party of the second part, as hereinafter provided, do
29 hereby promise and agree to and with the said party of the second part that they will furnish the material for, manufacture, deliver, and erect in its proper position all of the wrought-iron work for the aforesaid jail, mentioned and provided for in the aforesaid plans and specifications under the caption of "Specifications for wrought-iron work," and that they will furnish and erect the same as fast as the said jail-building shall be ready to receive the same, and they shall have had fifteen days' notice, in writing, of such readiness.

"And the said party of the second part promises and agrees to pay to the said party of the first part, for the wrought-iron work aforesaid, the sum of nine thousand one hundred and fifty dollars, ($9,150,) and to pay the same in four equal payments as the work progresses, reserving twenty per cent. of each installment until the completion of said jail-building; that is to say, when one-fourth of said iron-work shall be completed, there shall be paid one-fourth of the aforesaid sum of nine thousand one hundred and fifty dollars, less twenty per
30 cent. of said fourth; and thereafter, upon the completion of each successive one-fourth of said iron-work, there shall be paid a one-fourth of the aforesaid sum of nine thousand one hundred and fifty dollars, less twenty per cent. of such fourth, until the whole iron-work is completed; and when said jail-building shall be completed, the remainder of said sum of nine thousand one hundred and fifty dollars (including said reserved twenty per cent.) shall be fully paid.

"And it is mutually agreed by and between the parties hereto that if the aforesaid building committee shall make any changes in the material or construction of the aforesaid iron-work, then and in that case the said party of the first part, upon receiving reasonable notice, shall do such iron-work in accordance with such changes; and if such changes shall increase the cost of said work, then such additional cost, to be computed in proportion to the above-mentioned price for the whole, shall be allowed and paid to the party of the first part; but if such changes shall decrease the cost of said work, then the party of the second part shall be allowed the amount of such decrease, to be computed as aforesaid.

31 "In witness whereof the said parties have hereunto set their hands, the day and year first above written, in duplicate.

"B. F. HAUGH,
"J. R. HAUGH,
"T. H. BUTLER.
"JOHN ALLEN."

They, the said defendants, then and there undertook, promised, and guaranteed to and with the said plaintiffs the faithful performance of the said agreement on the part of the said John Allen.

And the said plaintiffs aver that they, confiding in the said promise, undertaking, and guarantee of the said defendants, then and there made as aforesaid, did then and there make the said agreement with the said John Allen, and did afterwards, to wit, on or about the 1st day of May, A. D. 1872, at, to wit, the northern district of Illinois aforesaid, in pursuance of the said agreement, furnish the material for, manufacture, deliver, and erect in its proper position one-fourth of the wrought-iron work for the jail-building in the said agreement specified, as mentioned and provided for in certain plans and specifications
32 prepared for the construction of said jail-building by Cass Chapman, architect, under the caption of "Specifications for wrought-iron work," and referred to in said agreement, save that in so far as changes were made in the material or construction of the aforesaid iron-work by the building committee of the board of supervisors of the county of Winnebago, and these plaintiffs had reasonable notice of such changes, they did do said iron-work in accordance with such changes, and did furnish and erect the said iron-work, as fast as the said jail-building was ready to receive the same, and they, the said plaintiffs, had fifteen days' notice in writing of such readiness, and, in general, did complete the said one-fourth part of the said iron-work in

accordance with the tenor and effect, true intent and meaning of the conditions, provisions, and agreements in the said agreement in writing in that behalf contained.

And the said plaintiffs further aver that the said John Allen did not pay to them, the said plaintiffs, although often requested so to do, one-
fourth part of the sum of nine thousand one hundred and fifty
33 dollars, less twenty per cent. of said fourth, when the one-fourth
of the said iron-work was completed by the said plaintiff as aforesaid, in manner and form as he, the said John Allen, had agreed to pay in the said agreement in writing, so guaranteed by the said defendants, as aforesaid, or any part thereof, but wholly refused so to do, and has not yet paid the same or any part thereof, but still refuses so to do, of all which promises the said defendants on, to wit, the 1st day of August, A. D. 1872, had notice and were required by the said plaintiffs to guarantee the faithful performance of the said agreement in writing on the part of the said John Allen, according to the tenor and effect, true intent and meaning of the said promise, undertaking and guarantee of the said defendants in that behalf made as aforesaid; yet the said defendants, not regarding their said promise, undertaking, and guarantee, but contriving and fraudulently intending to deceive and defraud the plaintiffs in this behalf, have not in any manner paid to the said plaintiffs the
said one-fourth part of nine thousand one hundred and fifty dol-
34 lars less twenty per cent. of said fourth, or any part thereof, although
often requested so to do, but the said defendants have hitherto wholly neglected and refused so to do, and still do refuse, contrary to the tenor and effect of the said promise, undertaking, and guarantee so made by them as aforesaid at, to wit, the northern district of Illinois, aforesaid.

And whereas also the said defendants afterwards, to wit, on the first day of August, A. D. 1872, at, to wit, the northern district of Illinois, aforesaid, were indebted to the said plaintiffs in the sum of fifteen thousand dollars lawful money of the United States for the work and labor, care and diligence of the said plaintiffs before that time done, performed, and bestowed in and about the business of one John Allen, for the said def ndants, at their special instance and request, and also in the further sum of fifteen thousand dollars of like lawful money for divers goods, wares, merchandise, building material, and iron work by the said plaintiffs, before that time bargained and sold to the said defendants and delivered to one John Allen for the said defendants at their
special instance and request, and also in the further sum of fif-
35 teen thousand dollars of like lawful money for so much money
before that time paid, laid out, and expended for the said defendants at their special instance and request, and also in the further sum of fifteen thousand dollars of like lawful money for so much money before that time due and owing to the said plaintiffs from the said defendants, and then and there found to be in arrear and unpaid upon an account stated between the said plaintiffs and the said defendants, and being so indebted they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, to wit, the northern district of Illinois aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay them the said several sums of money in this count mentioned, when they, the said defendants, should be thereunto requested.

Nevertheless the said defendants, not regarding their said several promises and undertakings, but contriving and fraudulently intending to deceive and defraud the said plaintiffs in this behalf, have not as yet

paid the said several sums of money, or any, or either of them, or
36 any part thereof to the said plaintiffs, or either of them, although often requested so to do, but the said defendants to pay the same have hitherto wholly refused, and still do refuse.

To the damage of the said plaintiffs of fifteen thousand dollars, and therefore they bring their suit, &c.

By JEWETT & ADAMS,
*Plffs'. Attys.*

*Copy of the instrument and account sued on.*

Memorandum of an agreement made and entered into this eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy-one, between Benjamin F. Hough, Joseph R. Hough, and Thomas H. Butler, copartners under the firm name and style of Hough & Co., of Indianapolis, Indiana, party of the first part, and John Allen, of the city of Rockford, Illinois, party of the second part.

Whereas the said John Allen, on the 5th day of July, 1871,
37 entered into an agreemet with the board of supervisors of the county of Winnebago, in said State of Illinois, to erect and complete a jail building for said county of Winnebago, to be located on the court-house square, in said city of Rockford, and to be completed by the first day of April, A. D. 1872, and to be built according to the plans and specifications prepared by Cass Chapman, an architect of Chicago, one copy of which is now in the possession of the building committee of said board of supervisors in charge of the construction of said jail, and a copy of which, so far as they extend to the wrought-iron work for said jail, has been furnished to the said party of the first part; and whereas the said party of the second part is desirous of having the said party of the first part do the wrought-iron work for said jail and enter into an agreement in that behalf:

Now, therefore, this agreement witnesseth, that the said party of the first part, in consideration of the sum of money to be paid to them by the party of the second part as hereinafter provided, do hereby
38 promise and agree to and with the said party of the second part that they will furnish the material for, manufacture, deliver, and erect in its proper position all of the wrought-iron work for the aforesaid jail mentioned and provided for in the aforesaid plans and specifications, under the caption of "Specifications for wrought-iron work," and that they will furnish and erect the same as fast as the said jail building shall be ready to receive the same, and they shall have had fifteen days' notice in writing of such readiness.

And the said party of the second part promises and agrees to pay to the said party of the first part, for the wrought-iron work aforesaid, the sum of nine thousand one hundred and fifty dollars, ($9,150,) and to pay the same in four equal payments as the work progresses, reserving twenty per cent. of each installment until the completion of said jail building; that is to say, when one-fourth of said iron-work shall be completed there shall be paid one-fourth of the aforesaid sum of
39 nine thousand one hundred and fifty dollars, less twenty per cent. of said fourth, and thereafter, upon the completion of each successive one-fourth of said iron-work, there shall be paid a one-fourth of the aforesaid sum of nine thousand one hundred and fifty dollars, less twenty per cent of such fourth, until the whole iron-work is completed, and when said jail building shall be completed, the remainder of said sum of nine thousand one hundred and fifty dollars, (including said reserved twenty per cent.,) shall be fully paid.

And it is mutually agreed by and between the parties hereto, that if the aforesaid building committee shall make any changes in the material or construction of the aforesaid iron-work, then and in that case the ssid party of the first part, upon receiving reasonable notice, shall do said iron-work in accordance with such changes.

And if such changes shall increase the cost of such iron-work, then such additional cost to be computed in proportion to the above-
40 mentioned price for the whole shall be allowed, and paid to the party of the first part, and if such changes shall decrease the cost of such work, then the party of the second part shall be allowed the amount of such decrease, to be computed as aforesaid.

In witness whereof the said parties have hereunto set their hands, the day and year first above written, in duplicate.

B. F. HOUGH.
JOS. R. HOUGH.
T. H. BUTLER.
JOHN ALLEN.

In consideration of the making of the foregoing agreement by the said Benjamin F. Hough, Joseph R. Hough, and Thomas H. Butler, we, Gilbert Woodruff, Horace Brown, and George S. Haskill, of the city of Rockford, Illinois, do hereby guarantee the faithful performance of the said agreement on the part of the said John Allen.

Witness our hands this 18th day of July, A. D. 1871.

GILBERT WOODRUFF.
HORACE BROWN.
GEO. S. HASKILL.

41 ROCKFORD, *Aug.* 1*st*, 1872.

*Gilbert Woodruff, Horace Brown, and George S. Haskill, to Benjamin F. Hough, Joseph R. Hough, and Thomas H. Butler, Dr.*

| | |
|---|---|
| For work and labor | $15,000 |
| For goods, wares, merchandise, building material, and iron-work sold and delivered | $15,000 |
| To money paid, laid out, and expended for them | $15,000 |
| To money found due on account stated | $15,000 |

(Endorsed:) Filed Sept. 20, 1872. Wm. H. Bradley, clk.

42 And afterwards, to wit, on the sixth day of November, A. D. 1872, the said defendants, by Sleeper & Whiton, their attorneys, come and file their pleas herein, which reads in the words and figures following, to wit:

43 Circuit court of the United States, northern district of Illinois.

GILBERT WOODRUFF, HORACE BROWN, & George S. Haskill
*ads.*
BENJ. F. HOUGH, JOSEPH R. HOUGH, & Thomas H. Butler.

And now come the said defendants, by Sleeper & Whiton, their attorneys, and defend the wrong & injury when, &c., and say that they did not undertake or promise in manner & form as the said plaintiffs have

above thereof complained against them ; and of this they the said defendants put themselves upon the country, &c.

SLEEPER & WHITON,
*Defts'. Attys.*

44 And for a further plea in this behalf, by leave of the court, &c., the said defendants say actio non because they say that the said several supposed causes of action in the said several counts in the said declaration, are for one and the same thing, to wit, the alleged liability of the defendants as guarantors or sureties for one John Allen, upon the written agreement executed by the defendants to the said plaintiffs, a copy whereof is set forth in the several counts of the said declaration.

And these defendants aver that the agreement of the said John Allen with the board of supervisors of the county of Winnebago and State of Illinois, referred to in the copy of the agreement between the said John Allen and the said plaintiffs, which is set forth in said several counts of the said declaration, was in the words and figures following, that is to say :

"This agreement, made and concluded this fifth day of July, A. D. 1871, & between John Allen, of Rockford, Ills., party of the first part, and the board of supervisors of Winnebago County, State of Illi-
45 nois, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the payments to be to him made by the said party of the second part as herein set forth, hereby covenants and agrees to erect and complete for said second party, a jail and jailor's house on such portion of the public square on which the county buildings now are, in the city of Rockford, on the west side of Rock River, in said Winnebago Co., as shall be designated by John Lake, F. E. Latham, & John Beatty, building committee, appointed by said board, or a majority of them.

"Said work to be done in accordance with plans prepared for the doing of the same by Cass Chapman, of Chicago, Ills., & now in the hands of said committee, and with the specifications appended hereto and made a part of this contract, said work to be begun on or before the tenth day of July, A. D. 1871, and to progress regularly & uninterruptedly after it shall have been begun & so as to give the necessary time for each part thereof to settle & harden, except as shall be otherwise ordered by said committee, and said
46 building shall be fully inclosed by the first day of December next, and the entire job finished & fully completed on or before the first day of April, A. D. 1872, the time of commencement, rate of progress, and time of completion being essential conditions of this contract.

Time of beginning and completing of.

"The sewer connecting the drain at the building with the street sewer shall not be less than fifteen (15) inches in diameter in the clear on the inside, and to be made of hard-burned brick, laid in water-lime cement, or the best Ohio drain pipe; connection with the street sewer to be made in the centre of Church and Elm streets, or as near that point as the building committee shall direct.

Sewer.

"Red brick shall be used in the erection of said building and they shall be of as good quality & color as required in specifications.

Kind of brick.

"The open iron cross-partition in jail to be of hardened steel and open lattice-work, as shown on detail drawings.

Iron cross-partition.

"And said first party hereby covenants and agrees to

perform all of said work under the general direction and control of said building committee and under the immediate per-

47 Work to be done under superintendence, &c., of John Beatty.

sonal supervision & direction of John Beatty as superintendent, or of such other superintendent as said second party may appoint.

"Said building committee shall have the right to make any changes in the materials or construction of said building by giving to first party reasonable notice thereof, and the cost of such change, if any, either of addition to or deduction from the original contract price, to be completed at the same rate as said contract price, and in case of difference arising between said first party and said committee as to the amount of such deduction or addition for such change, the same shall be adjusted by arbitration as provided in the aforesaid specifications, but it is distinctly understood that no such change so made or ordered shall in any way invalidate this contract.

Building committee may make changes, &c.

"All the work on said building shall be executed in the best and most workmanlike manner & no improper materials shall be used, but all materials of every kind shall fully answer the specifications, or, if not particularly specified, shall be suitable for the place where used.

Workmanship to be the best, &c. Also, material.

48 "All materials used & work done shall be subject to the inspection and approval of the aforesaid superintendent, and if at any time in his judgment the work being done, or materials being furnished and used, shall not be in accordance with the requirements of this contract & the aforesaid plans & specifications, he shall have power to stop the work until the difference shall be adjusted as provided by arbitration in said specifications.

All to be subject to inspection and approval of Superintendent.

"And should there be any defect or defects, either of materials or workmanship discovered either before or after the completion of said structure, such defects shall not be waived or excused by the fact that *that* the superintendent has not noticed it or them, or has passed them by without mention, but the said first party shall & will be held responsible for a good and perfect job.

Defects, &c.

"And should the weather be unusually wet or so cold and frosty that any part of the work cannot be done in a proper manner or with due regard to durability, or should such be the case from any other cause, then said building committee may order such part of the work to be suspended altogether until a more

Wet or cold weather, &c.

49 suitable season, and in such case said first party shall then cover & otherwise sufficiently protect the several parts of the work so that the same shall not be injured by the weather.

"And if in the prosecution of said work it shall be necessary to dig up, use, or occupy any street, alley, or public ground of the said city of Rockford, or of said county of Winnebago, said first party covenants and agree that he will erect and maintain at all times such barriers and, during the night, such lights as will effectually prevent the happening of any accident or harm to person or property of any individual in consequence of such digging up, use, or occupancy. And further that he shall be liable for, and shall save and keep harmless said second party from, all damages in any way arising from the digging up, use, or occupancy of any such street, alley, or public ground, or which may in any way, or to any person result from the carelessness or neglect of such contractor or his agents, employees, or workmen.

To save and keep harmless the co. from damages, &c.

"In case said first party shall neglect or refuse to select an arbitrator

Refusal to select arbitrator or to abide award, &c.

after five days' notice so to do, said building committee may then select two arbitrators, and the two so chosen shall select a third. And the arbitrators so chosen shall proceed to hear & determine the matters in controversy and make their award, as provided for in said specifications.

"And in case said first party shall at any time neglect or refuse to abide by & fully perform the award of arbitrators rendered in pursuance of this contract & the said specifications, said building committee may at its discretion declare the contract forfeited either as to the whole or any part of the work, and may either relet the same or employ hands and procure said award to be fully & satisfactorily performed, and in either case to charge the same to said first party and deduct and reserve the same from any monies due or to become due him.

"And the said party of the second part hereby covenants and agrees,

Payment.

in consideration of the aforesaid covenants & agreements to be kept & performed by said first party, to pay to him when this contract shall be wholly carried out & completed by the said first party, and when the structure shall have been accepted by said building committee the sum of thirty-nine thousand and ninety-two dollars, ($39,092.00,) at the time and in the manner provided in said specifications.

"In testimony whereof the said party of the first part has hereunto set his hand & seal, and said board of supervisors has caused its signature by its said building committee to be hereto affixed, the day and year first-above written.

"JOHN ALLEN. [SEAL.]

"Board of supervisors of Winnebago Co.

"By JOHN LAKE,

"JOHN BEATTIE,

"*Building Committee.*"

And these defendants aver that their said agreement of guaranty was executed at the same time that the said agreement between the said John Allen and the said plaintiffs was signed and mutually delivered, to wit, on the 18th day of July, A. D. 1871, and at the same time the said Allen and the plaintiffs exhibited to the defendants the said agreement between the said Allen and the said board of supervisors, and after careful examination and enquiry, these defendants believing that the said Allen could perform the work stipulated to be done by him in his said agreement with the said board of supervisors for the price in such agreement to be paid to him therefore, did sign the said agreement of guaranty, but in so doing these defendants place no reliance whatever upon the personal responsibility of said Allen, but knowing him to be honest, vigilant, and competent for the work proposed to be done, these defendants were willing to become his sureties or guarantors for any work that they could see he could perform without loss, but these defendants would have absolutely refused to sign said agreement of guaranty, if for the price to be paid for the work provided to be done by him in his said agreement with said board of supervisors these defendants had believed that the said Allen might undertake to do more extensive and costly work for the said board of supervisors than was provided for in his said original contract with them, and for no larger compensation than was provided for in such original contract.

And these defendants aver that after they had executed the said agreeement of guaranty, to wit, on the 1st day of August,

A. D. 1871, the said original agreement between the said Allen and the said board of supervisors was, with the knowledge of the plaintiff, to wit, at the date last aforesaid, but without the consent or knowledge of the defendants, materially altered and charged by the said Allen and the said board entering into a supplementary contract appended to such original contract and modifying the same and which was in the words and figures following:

"It is hereby mutually agreed by and between the parties to the above contract that the iron doors to cells, lattice, iron cross-partition, and the doors in the same in the above contract & specifications mentioned, shall be made wholly of iron.

"The iron used therein shall be of the best quality and of the dimensions and distances apart as shown in plans marked A & B.

" The said doors & partition shall be constructed & put together in the manner shown in the aforesaid plans A & B, and the whole
54 completed & finished in the most thorough & workmanlike manner, according to the spirit & intent of the above specifications & contract."

"It is further mutually agreed and distinctly understood, that for making the above change there shall be no additional charge over & above the original contract price. The locks and hinges and fastenings to the doors above mentioned shall be the same as provided in the original contract.

"JOHN ALLEN.

" Dated this first day of August, A. D. 1871.

"JOHN LAKE,
"JOHN BEATTIE."

55 And these defendants aver that the changes introduced into the said original contract with said board of supervisors, by said supplementary contract imposed upon the said Allen a much more extensive and costly work than was provided to be done by him in his said original agreement with said board, and to the extent of a large sum, to wit, the sum of twelve hundred dollars, whereby the said Allen, for no increased compensation, became bound by a contract with said board, which he could not perform without a large loss to himself, to wit, a loss of at least one thousand dollars, as the said plaintiffs then & there well knew; yet, nevertheless, the said plaintiffs, for an increased price in a large sum, to wit, the sum of $1,200, undertook to furnish the said Allen the wrought-iron work provided for in such original & supplementary contracts, & all the materials furnished by the plaintiffs to the said Allen for the construction of said jail, were furnished subsequent to the execution of said supplementary contract, and as soon as these defendants were informed of such supplementary contract on the part of said Allen, they repudiated the same and refused their
56 assent thereto, and have at all times since, and hitherto refused and still refuse to be responsible for any contracts of the said Allen, either with the said board or with the said plaintiffs, of all which the said plaintiffs then & there had notice. Wherefore, the defendants aver that by reason of the premises aforesaid, they being mere sureties and guarantors for the said Allen, became and still are released and discharged of & from all liability to the plaintiffs upon the said agreement of guaranty in the said several counts mentioned; and this they, the said defendants are ready to verify; wherefore they pray judgment, *ect.*

SLEEPER & WHITON,
*Deft's. Attys.*

And for a further plea in this behalf by leave of the court, &c., the said defendants say, actio non, because they say that the said several supposed causes of action in the said several counts in the said declaration are for one and the same thing, to wit, the alleged liability of the defendants as guarantors or sureties for one John Allen upon the written agreement executed by the defendants to the said plaintiffs,
57 a copy whereof is set forth in the several counts of the said declaration.

And these defendants aver that the agreement of the said John Allen with the board of supervisors of the county of Winnebago and State of Illinois, referred to in the copy of the agreement between the said John Allen and the said plaintiffs, which is set forth in the said several counts of the said declaration, was in the words and figures fully set forth in the last foregoing plea in the copy of the agreement therein purporting to have been made by and between the said Allen and the said board of supervisors.

And these defendants aver that their said sgreement of guaranty was executed at the same time that the said agreement between the said John Allen and the said plaintiffs was signed and mutually delivered, to wit, on the 18th day of July, A. D. 1871, and at the same time the said Allen and the plaintiffs exhibited to the defendants the said agreement between the said Allen and the said board of supervisors; and, after careful examination and inquiry, these defendants did
58 sign the said agreement of guaranty, but only because they believed that the said Allen could perform the work stipulated to be done by him in his said agreement with the said board of supervisors for the price in such agreement to be paid to him therefor, if, having begun the work specified to be done by him in his said agreement with the board of supervisors aforesaid on or before the 10th day of July, A. D. 1871, such work should progress regularly and uninterruptedly after it should be begun, under the direction of the building committee of said board, so that the building in said agreement with said board referred to should be fully enclosed by the 1st day of December, A. D. 1871, and the entire job in such last named agreement to be performed by said Allen should be finished and fully completed on or before the first day of April, 1872; but in signing the said agreement of guaranty these defendants placed no reliance whatever upon the personal responsibility of said Allen, but, knowing him to be honest, vigilant, and competent for the work proposed to be done, these defendants were willing to become his sureties or guarantors for any work that they could
59 see he could perform without loss; but these defendants would have absolutely refused to sign the said agreement of guaranty if a right had been reserved in the said agreement between the said Allen and the said board by which they might, at their discretion, extend the time within which the work provided to be done in such agreement by the said Allen might be performed, and so subject the said Allen and these defendants to the risk of loss by reason of a rise in the cost of labor and materials.

And these defendants aver that after they had signed the said agreement of guaranty, and without their consent or knowledge, at divers times the said Allen and the said board entered into contracts modifying their said original contract by extending the time for completing the different portions of the work provided to be done by said Allen in said original contract for a long time, to wit, several months after the time provided for such completion in said original contract, so that, in fact, before the final completion of such work by said Allen the value of

labor and materials had become much greater than they were
60 during the period in which such work was to be completed by said original contract with said board of supervisors.

And the defendants further aver that, as soon as they had ascertained that the said Allen and the said board of supervisors had extended t time for the performance of the contract between them as aforesaid, they refused, & have at all times since refused, their assent to such change, and have at all times since refused, and still do refuse, to be responsible for any contracts of the said Allen either with the said board or the said plaintiffs, of all which the plaintiffs then & there had notice.

Whereupon the defendants aver that, by reason of the premises aforesaid, they being mere sureties and guarantors for the said Allen, became and still are released and discharged of and from all liability to the plaintiffs upon the said agreement of guaranty in the said several counts mentioned; and this they, the said defendants, are ready to verify. Wherefore they pray judgment, *ect.*

SLEEPER & WHITON,
*Defts.' Attys.*

61 And for a further plea in this behalf, by leave of the court, etc., the said defendants say actio non, because they say that the promises in the agreement between the said John Allen and the said plaintiffs, a copy whereof is set forth in the said several counts of the said declaration, were mutual and dependant, and thereby the plaintiffs were not entitled to have or recover of and from the said Allen any sum of money whatever, unless they, the said plaintiffs, should first entitle themselves thereto by furnishing the material for manufacturing, delivering, and erecting in its proper position all of the wrought-iron work for the jail referred to in such agreement, and at the time and in the manner provided for therein. And the defendants aver that the wrought-iron work furnished by the plaintiffs to the said Allen to be used in the construction of said jail in alleged conformity to the said agreement between the plaintiffs and said Allen, was not of the quality or the character provided for in such agreement; but, on the contrary, a large portion thereof was of such poor, weak, and inferior quality as to be
62 utterly unfit for use in the erection of said jail; and the said Allen, on account of such defect in such wrought-iron work, so furnished by the said plaintiffs, was unable to use such large portion of the same in the erection of said jail; and such other portion of the said wrought-iron work furnished to the said Allen by the plaintiffs in pretended compliance with their said agreement with him, and which he, the said Allen, was able to use in the construction of said jail, he, the said Allen, received and used in such construction under protest, not accepting the same as a compliance with the said agreement between him and the said plaintiffs on their part; but, being willing to pay the plaintiffs such sum of money as they reasonably deserved to have for and on account of all the wrought-iron work furnished by them which he, the said Allen, could use in the construction of said jail, the said Allen did pay them, the said plaintiffs, in cash, the full value of and all they reasonably deserved to have for all the wrought-iron work delivered to him by the said plaintiffs, and which could be used in the
63 construction of said jail, to wit, at the place aforesaid; of all which the said plaintiffs then and there had notice, and this they, the said defendants, are ready to verify. Wherefore they pray judgment, *ect.*

SLEEPER & WHITON,
*Defts.' Attys.*

And for a further plea in this behalf, by leave of the court, *ect.*, the said defendants say actio non, because they say that the promises in the agreement between the said John Allen and the said plaintiffs, a copy whereof is set forth in the said several counts of the said declaration were mutual and dependant, and thereby the said plaintiffs were not to be entitled to have or recover of or from the said Allen, any sum of money whatever, unless they, the said plaintiffs, should first perform their promises in such agreement contained. And these defendants aver that the said plaintiffs did not, nor would furnish the material for, manufacture, deliver, and erect in its proper position all the wrought-iron work for the jail in said agreement referred to, and in the manner and at the time required of them by their said agreement with
64 said Allen, by reason whereof the said plaintiffs have no right of action whatever against the said John Allen, upon their contract with him aforesaid; of all which the plaintiffs then and there had notice, and this they, the said defendants, are ready to verify; wherefore they pray judgment, &c.

SLEEPER & WHITON,
*Defts.' Attys.*

And for a further plea in this behalf, by leave of the court, &c., the said defendants say actio non, because they say that the said several supposed causes of action in the said several counts of the said declaration contained, are for one and the same thing, to wit, the alleged liability of the defendants as guarantors or sureties for one John Allen, upon the written agreement executed by the defendants to the plaintiff, a copy whereof is set forth in the several counts of the said declaration.

And these defendants aver that the agreement of the said John Allen with the board of supervisors of the county of Winnebago & State of Illinois, referred to in the copy of the agreement between the said
65 John Allen and the said plaintiffs which is set forth in the said several counts of the said declaration was in the words & figures fully set forth in the second plea herein before pleaded in the copy of the agreement therein purporting to have been made by & between the said Allen & the said board of supervisors.

And these defendants aver that their said agreement of guaranty was executed at the same time that the said agreement between the said John Allen & the said plaintiffs was signed & mutually delivered, to wit, on the 18th day of July, A. D. 1871, & at the same time the said Allen and the said plaintiffs exhibited to the defendants the said agreement between the said Allen & the said board of supervisors; & after careful examination & enquiry, these defendants did sign the said agreement of guaranty, but only because they believed that the said Allen could perform the work stipulated to be done by him in his said agreement with the board of supervisors, for the price in such agreement to be paid to him therefor, if having begun the work specified to be done by him in his said agreement with said board on or before the 10th day of July, A. D. 1871, such work should progress regularly &
66 uninterruptedly after it should be begun, under the direction of the building committee of said board, so that the building in said agreement with said board referred to should be fully enclosed by the first day of December, A. D. 1871, and the entire job in such last-named agreement to be performed by the said Allen should be finished & fully completed on or before the 1st day of April, A. D. 1872. But in signing the said agreement of guaranty, these defendants placed no reliance whatever upon the personal responsibility of said Allen; but knowing

him to be honest, vigilant, & competent for the work proposed to be done, these defendants were willing to become his sureties or guarantors for any work that they could see he could perform without loss; but these defendants would have absolutely refused to sign the said agreement of guaranty if the progress and final completion of the work to be performed by the said Allen under his said agreement with the said board of supervisors might be delayed & postponed by the neglect or refusal of the said defendants to furnish & suitably erect in its proper position the wrought-iron work to be provided by them for the con-
67 struction of said jail at the times stipulated in their said agreement with the said Allen, and so subject the said Allen and the plaintiffs to the risk of loss by reason of a rise in the cost of labor & materials.

And the plaintiffs aver that, after they had signed the said agreement of guaranty, without their consent or the consent of the said Allen or the said board of supervisors, the said plaintiffs on many occasions neglected & refused to deliver and erect in its proper position the wrought-iron work for said jail at the times whereon they had agreed so to do by their said contract with the said Allen, whereby the said Allen was greatly delayed and hindered in the erection and completion of said jail, & was unable to complete the same, by reason of the said conduct of the plaintiffs, by the 1st day of April, A. D. 1872, nor for a long period thereafter, to-wit, the period of six months, & by reason of such hinderance and delay, by the aforesaid conduct of the plaintiffs, the said Allen was compelled to & did pay largely increased prices for labor & material used in constructing said jail over what he would have paid had he been able to complete said jail by the 1st day of April,
68 A. D. 1872. And these defendants further aver that as soon as they ascertained that the said plaintiffs did not & would not perform their contract with the said Allen as aforesaid, by furnishing and erecting in its proper place the iron-work provided to be done by them as aforesaid at the time provided for the erection of such work in said jail by their said contract with the said Allen, they, the said defendants, refused, and have at all times since refused, to be bound by their said contract of guaranty, of all which the said plaintiffs then & there had notice.

Wherefore the defendants aver that, by reason of the premises aforesaid, they being mere sureties for the said Allen, became and still are released and discharged of and from all liability to the plaintiffs upon the said agreement of guaranty in the said several counts mentioned. And this they, the said defendants, are ready to verify. Wherefore they pray judgment, &c.

SLEEPER & WHITON,
*Defts'. Atty.*

(Endorsed:) Filed Nov. 6, 1872. Wm. H. Bradley, cl'k.

69 And afterwards, on the 6th day of November, A. D. 1872, the said plaintiffs filed their demurrer to the pleas of the said defendant; which demurrers read in the words and figures following, to wit:

UNITED STATES OF AMERICA,
*Northern District of Illinois:*

In the circuit court of the United States for the northern district of Illinois.

BENJAMIN F. HAUGH, JOSEPH R. HAUGH, AND Thomas H. Butler,
*v.*
GILBERT WOODRUFF, HORACE BROWN, AND George S. Haskill.

And the said plaintiffs, as to the plea of the said defendants, by them first above pleaded, and whereof they have put themselves upon the country, do the like.

JEWETT & ADAMS,
*Attorneys for Plffs.*

And the said plaintiffs, as to each and all the rest of the said pleas
70 of the said defendants by them above pleaded, say that the same and the matters therein contained *the* manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendants; and that they, the said plaintiffs, are not bound by law to answer the same. And this they, the said plaintiffs, are ready to verify. Wherefor', by reason of the insufficiency of each and all of said pleas in this behalf, the said plaintiffs pray judgment and damages by them sustained by reason of the not performing of the said several promises and undertakings in the said declaration mentioned to be adjudged to them, &c.

And the said plaintiffs, according to the form of the statute in such case made and provided, states and shows to the court here the following cause of demurrer to the said fourth plea, by the said defendants above pleaded, that is to say, for that the said pleas is double
71 and contains a two-fold answer to the said declaration in this, to wit, that the said defendants have thereby pleaded and alledged what amounts in substance to the general issue, and also a plea of payment and satisfaction; and also that the said plea is in other respects uncertain, informal, and insufficient, &c.

And the said plaintiffs, according to the form of the statute in such case made and provided, state and show to the court here the following cause of demurrer to the said fifth plea by the said defendant above pleaded, that is to say, that it amounts to the general issue and also that the said plea is in other respects uncertain, informal, and insufficient.

Wherefor', by reason of the insufficiency of each and all of said pleas, the said plaintiffs pray judgment and damages by them sustained by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, be adjudged to them, &c.

JEWETT & ADAMS,
*Attorneys for Plffs.*

72 (Endorsed:) Filed Nov. 6th, 1872. W. H. Bradley, clk.

And thereupon, afterwards, to wit, on the 18th day of November, A.

D. 1872, the following order was made and entered of record in said cause, to wit:

BENJAMIN F. HAUGH ET AL.
*v.*
GILBERT WOODRUFF ET AL. } Assumpsit.

The court having considered and being now fully advised upon the demurrer of the plaintiffs to all of the pleas filed herein, except the plea of the general issue, sustains said demurrer.

And afterwards, to wit, on the same day and year last aforesaid, the following proceedings were had and entered of record, to wit:

BENJAMIN F. HAUGH ET AL.
*v.*
GILBERT WOODRUFF ET AL. } Assumpsit.

73 Now come the parties, by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit, J. G. Ragan, Nathan S. Grandy, George H. West, Samuel McCotter, George H. Hunter, George Meisters, W. G. Earl, Nathaniel Sleeper, Thomas Thayer, George Ekins, N. S. Scoville, and William Pierce, who were all duly elected, tried, and sworn well and truly to try said issue; and, after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the 19th day of November, A. D. 1872, the further following proceedings were had in said court and entered of record, to wit:

BENJAMIN F. HAUGH ET AL.
*v.*
GILBERT WOODRUFF ET AL. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn; and, after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial is postponed until to-morrow morning.

74 And afterwards, to wit, on the 20th day of November, A. D. 1872, the further following proceedings were had in said court and entered of record, to wit:

BENJAMIN F. HAUGH ET AL.
*v.*
GILBERT WOODRUFF ET AL. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn; and, after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the 21st day of November, A. D. 1872, the

further following proceedings were had in said court and entered of record, to wit:

BENJAMIN F. HAUGH ET AL.
*v.*
GILBERT WOODRUFF ET AL. } Assumpsit.

Now come again the parties, by their attorneys, and now come
75 also the jury in this behalf empannelled and sworn; and, after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the 22d day of November, A. D. 1872, the further following proceedings were had in said court and entered of record, to wit:

BENJAMIN F. HAUGH ET AL.
*v.*
GILBERT WOODRUFF ET AL. } Assumpsit.

Now come again the parties, by their attorneys, and come also the jury in this behalf empannelled and sworn; and, after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial is postponed until to-morrow morning.

And afterwards, to wit, on the 23d day of November, A. D. 1872, the further following proceedings were had in said court and entered of record, to wit:

76 BENJAMIN F. HAUGH ET AL.
*v.*
GILBERT WOODRUFF ET AL. } Assumpsit.

Now come the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn; and after hearing the concluding evidence and a part of the argument of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until Monday morning next.

And afterwards, to wit, on the 25th day of November, A. D. 1872, the further following proceedings were had in said court and entered of record, to wit:

BENJAMIN F. HAUGH ET AL.
*v.*
GILBERT WOODRUFF ET AL. } Assumpsit.

Now come again the parties, by their attorneys, and now comes also the jury in this behalf empannelled and sworn; and after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict; and, after a
77 short absence the jury returned into court the following verdict, to wit: We, the jury, find the issue for the plaintiffs, and assess their damages to the sum of five thousand dollars. And thereupon the defendants, by their attorney, move the court for a new trial herein.

And afterwards, to wit, on the 23d day of December, A. D. 1872, the further following proceedings were had in said court, to wit:

BENJAMIN F. HAUGH ET AL.
*v.*
GILBERT WOODRUFF ET AL. } Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendants heretofore entered herein for a new trial of this cause; and, after hearing the argument of counsel, the court takes the same under advisement.

And afterwards, to wit, on the 8th day of January, A. D. 1873, the further following proceedings were had in said court in said cause to wit:

78 BENJAMIN T. HAUGH, JOSEPH R. HAUGH and Thomas H. Butler
*v.*
GILBERT WOODRUFF, HORACE BROWN, AND George S. Haskill. } Assumpsit.

The court having considered and being now fully advised upon the motion of the defendant heretofore entered herein for a new trial of this cause, overrules the same.

It is thereupon considered and adjudged by the court that the plaintiffs do have and recover of the defendants the said sum of five thousand dollars, their damages so as aforesaid assessed, together with their costs in this behalf expended, amounting to the sum of sixty-five dollars and forty-five cents; and that they have execution therefor.

79 On the hearing of said cause the following exceptions were taken and were allowed by the court, and made of record, and are in words and figures following, to wit:

UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

Circuit court of the United States for the northern district of Illinois, of October term, 1872.

Be it remembered that, in the term of October, of the said court for the year A. D. 1872, came Benjamin F. Haugh, Joseph R. Haugh, and Thomas H. Butler, by Jewett and Adams their attorneys, into the said court and impleaded Gilbert Woodruff, Horace Brown, and George S. Haskill, in a certain plea of trespass on the case, upon promises, in which the plaintiffs declared as appears of record herein.

To which declaration the defendants pleaded as appears of record herein.

And thereupon issue was joined between the said plaintiffs and the said defendants; and, afterwards, to wit, on the 18th day of November, A. D. 1872, before the Hon. H. W. Blodgett, judge of said court, the aforesaid issues so joined as aforesiad, came on to be tried by a jury, duly empannelled and sworn; and upon the trial of such issue the
80 plaintiffs, to maintain the issue on their part, offered in evidence the written agreement, bearing date July 18, 1871, executed by

the plaintiffs and John Allen; also the guaranty of the performance thereof on the part of said Allen, by the defendants, also bearing date July 18, 1871, copies of which agreement and guaranty are set forth in the said declaration. The plaintiffs also offered in evidence the specifications for wrought-iron work referred to in the said agreement between the plaintiffs and John Allen; which specifications were in the words and figures following:

81 *Specifications of the wrought-iron work.*

NOTE.—All of the work described under the head of "iron work," will be made of the best quality of Lake Superior iron, unless otherwise ordered in writing by the superintendent.

SIDE LINING.

The sides of the jail-room and centre partitions, lengthwise of jail, will be lined with boiler-iron plates, one-fourth of an inch thick, not less than twenty-four, nor more than thirty inches wide, and in one piece from floor to ceiling. These plates will be riveted to angle or T iron bars as may be required in the formation of angles, &c. These bars will have flanges extending each way two inches, and will weigh not less than four lbs. per lineal foot. The rivets used will be three eighths of an inch in diameter made of the best Sweeds iron. The plates and angle or T iron will be drilled and countersunk. The rivets will be put in without heating, well riveted up and heads nicely raised with heading tool. The plates will extend down and up into the stone floor and ceiling one inch.

OPEN IRON PARTITION.

For the centre open-work partition cross-wise the jail, propositions will be received for the perpendicular one-and-one-half-inch bars, and for the latticed works, as represented by the detail drawings. The building committee reserving the right to adopt either.

82 The doors in this partition will be made the same as the cell-doors.

Wickets will be made where indicated on the plans, of the same material as side lining, and will extend entirely through the wall with an aperture on corridor side one inch in diameter, with close-fitting cover hung at the top; the inside of this opening where attached to the lining will be carefully made. The funnel-shaped piece will have flange three inches wide turned over the plaiting and riveted as before stated; the rivets throughout will not be more than three inches from centres. "This will be insisted upon."

WINDOWS, FRAMES, AND SASH.

The window-frames in jail will be entirely of iron, also the sash, of which the lower one shall be hung with steel-wire sash-cord and weights to evenly balance it. See details.

WINDOW-GUARDS.

The outside window-guards will be made of one and one-fourth diameter round steel-rods, placed four and one-half inches from centers, pass-

ing through the angle-iron casing, as shown on the drawings, and turned back into the wall at least one foot on each side of the frame.

INSIDE WINDOW-GUARDS.

The inside window-guards will be made of one and one-fourth diameter round iron, placed not more than four and one-half inches from centers, and passing through the bars, which bars are $\frac{5}{8} \times 3\frac{1}{2}$ inches
83 and firmly riveted at each end as shown on the detailed drawings; the plate closing each end of this basket will be three-eight's of an inch thick; as shown, the bar under lower and over upper end will be turned down and up making the attachment to the inside lining as shown in the detail drawings.

CELL-DOORS.

Cell-doors will be made as shown on detail drawings, of a combination of angle-iron forming the outer rim vertical bars, and an interlacing of smaller steel bars firmly riveted together with steel rivets three eight's of an inch in diameter; the hinges will be made of best Sweeds iron; the pivots or pins will be of steel $\frac{7}{8}$ of an inch in diameter, all to be turned up true and perfect; the lower hinge will carry the door, the upper one being turned down holding the door in place, the lower strap of hinge will pass entirely across the door, forming clasp with staple for padlock, handle, &c., as fully described and set forth in detail drawings. All hinges and staples will pass entirely through the stone and have washer on the inside countersunk, and the hinge riveted; they will be further secured by running in melted lead around the enlarged part of the hinge as shown in detail drawings.

SLIDE-BAR.

The slide-bar will be made as represented on the plans with
84 levers enclosed in box where represented.

Against the open iron partition the door to these boxes will be about two inches higher than the top of lever when turned up, hung and secured in the same manner as other doors.

VESTIBULE.

The doors in open partition will be made same as cell-doors, have May's patent rotating hooks worked from the corridor to secure them; also a clasp and staple for padlock, where represented in the drawings. The door in close partition will be made of the same material as the partition to which it is hung, and have a small door of observation with door closing the same, and otherwise trimmed in accordance with the drawings.

DOORS TO THE JAIL.

The iron doors closing the entrance to the jail will be made of the best materials throughout, and in strict accordance with the meaning and intention of the drawings. The outside of the doors will be perfectly plain, the inside have stiles and rails as shown.

The inner door will have observation door as shown in the plan. This will be made of steel bars and securely fastened to the door.

It was objected by the said architect and superintendent that the side-linings, which by the specifications were to be of entire vertical plates extending from floor to ceiling, were formed of two plates riveted together, making a seam midway between the floor and ceiling, and that such plates were riveted back to two angle-irons, which had been riveted together to form a T instead of to solid T-iron.

It appeared that the plaintiffs, on account of such complaints, made some changes in the mode of fastening such plates in position so that so much of the lining as was completed by the plaintiffs was allowed by the architect and superintendent to remain, although they claimed that such work was inferior in quality to what was required by the said specifications.

It further appeared on the said trial that when the open iron lattice partition referred to in said specifications was prepared and brought upon the ground to be erected in its place in said jail, the said architect and superintendent absolutely refused to permit the same to be
91 erected in said jail, alleging that the same was not in conformity to the detailed drawings and plans, in that the vertical sections of said lattice-work were not entire, extending from floor to ceiling, but made in two parts, to be united midway between floor and ceiling by riveting, and in that the angles formed by the lattice bars were not brought to a flat, smooth bearing, of about 1½ inches in length, having through such bearings holes made and countersunk on each side to receive ⅝-inch rivets, countersunk on both sides. It appeared from the testimony that the vertical sections of said lattice-work were in fact not entire from floor to ceiling, but in two parts, to be riveted together midway between the floor and ceiling, and that the angles in the lattice-work were not brought to flat, smooth bearings; nor were the holes for rivets at the angle countersunk; but the angles in the work prepared by the plaintiffs were left as bent in making the angles, and so as to have a curved bearing, and these holes had been punched through the angles for the reception of ordinary ⅝-inch rivets, not countersunk.

It further appeared that said plaintiffs refused to make said lattice-work any different from that which had been prepared by them as aforesaid, and insisted that it was in substantial conformity to said
92 plans and specifications, and insisted on putting up in position the lattice-work so prepared by them; and said architect and superintendent still refusing to permit the plaintiffs so to do, unless they would first make such lattice-work conform to the said detailed drawings therefor, they, the said plaintiffs, thereupon abandoned the further performance of their said contract with the said John Allen.

There was proof tending to show on the trial that the linings and lattice partition, as prepared by the plaintiffs, would prove just as serviceable for the uses intended as if made in full conformity with the said specifications and detailed drawings. And it appeared that at the time when the plaintiffs abandoned the further performance of their contract as aforesaid, there remained to be constructed and put in position by them a considerable portion of said jail-linings, and other work provided to be done by them in their said contract with said Allen, in addition to said lattice partition. The plaintiffs' testimony tended to show that the jail-linings prepared by them were accepted by the architect and superintendent, and all objection as to their mode of manufacture waived.

And to maintain the issues on their part the defendants on said trial offered in evidence the contract of the said John Allen with the
93 board of supervisors of Winnebago County, Illinois, referred to

in the said contract of said Allen with the plaintiffs, which contract with such board was in the words and figures following:

94 This agreement, made and concluded this fifth day of July, A. D. 1871, by & between John Allen, of Rockford, Ills., party of the first part, and the board of supervisors of Winnebago County, State of Illinois, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the payments to be to him made by the said party of the second part, as herein set forth, hereby covenants and agrees to erect and complete for said second party a jail and jailor's house on such portion of the public square, on which the county buildings now are in the city of Rockford, on the west side of Rock River, in said Winnebago Co., as shall be designated by John Lake, F. E. Latham, & John Beatty, building committee appointed by said board, or a majority of them.

Said work to be done in accordance with plans prepared for the doing of the same by Cass Chapman, of Chicago, Ills., & now in the hands of said committee, and with the specifications appended hereto and made a part of this contract.

95 TIME OF BEGINNING AND COMPLETION OF JOB.

Said work to be begun on or before the tenth day of July, A. D. 1871, and to progress regularly & uninterruptedly after it shall have been begun, & so as to give the necessary time for each part thereof to settle & harden, excepting as shall be otherwise ordered by said committee; and said building shall be fully inclosed by the first day of December next, and the entire job finished & fully completed on or before the first day of April, A. D. 1872; the time of commencement, rate of progress, and time of completion being essential conditions of this contract.

SEWER.

The sewer connecting the drain at the building with the street-sewer shall be not less than fifteen (15) inches in diameter in the clear, on the inside, and to be made of hard-burned brick, laid in water-lime cement, or the best Ohio drain-pipe; connection with the street-sewer to be made in the center of Church and Elm streets, or as near that point as the building committee shall direct.

KIND OF BRICK.

Red brick shall be used in the erection of said building, and they shall be of as good quality & color as required in specifications.

IRON CROSS PARTITION.

The open iron cross-partition in jail to be of hardened steel and
96 open lattice-work, as shown on detail drawings.

WORK TO BE DONE UNDER SUPERINTENDENT, &C., JOHN BEATTY.

And said first party hereby covenants and agrees to perform all of said work under the general direction and control of said building committee, and under the immediate personal supervision & direction of John Beatty, as superintendent, or of such other superintendent as said second party may appoint.

BUILDING COMMITTEE MAY MAKE CHANGES, &C.

Said building committee shall have the right to make any changes in the materials or construction of said building by giving to first party reasonable notice thereof, and the cost of such change, (if any,) either of addition to or deduction from the original contract-price, to be computed at the same rate as said contract-price; and in case of difference arising between said first party and said committee as to the amount of such deduction or addition for such change, the same shall be adjusted by arbitration, as provided in the aforesaid specifications, but it is distinctly understood that no such change so made or ordered shall in any way invalidate this contract.

WORKMANSHIP TO BE THE BEST, &C., ALSO MATERIALS.

All the work on said building shall be executed in the best and most workmanlike manner, & no improper materials shall be used; but
97 all materials of every kind shall fully answer the specifications, or if not particularly specified, shall be suitable for the place where used.

ALL TO BE SUBJECT TO INSPECTION & APPROVAL OF SUPERINTENDENT.

All materials used & work done shall be subject to the inspection and approval of the aforesaid superintendent, and if at any time, in his judgment, the work being done or materials being furnished & used shall not be in accordance with the requirements of this contract & the aforesaid plans & specification, he shall have power to stop the work until the difference shall be adjusted as provided, by arbitration in said specifications.

DEFECTS, &C.

And should there be any defect or defects, either of materials or workmanship, discovered, either before or after the completion of said structure, such defects shall not be waived or excused by the fact that *that* the superintendent has not noticed it or them, or has passed them by without mention, but the said first party shall & will be held responsible for a good and perfect job.

WET OR COLD WEATHER, &C.

And should the weather be unusually wet, or so cold & frosty that any part of the work cannot be done in a proper manner, or with due regard to durability, or should such be the case from any other
98 cause, then said building committee may order such part of the work to be suspended altogether until a more suitable season; and in such case said first party shall then cover & otherwise sufficiently protect the several parts of the work, so that the same shall not be injured by the weather.

TO SAVE & KEEP HARMLESS THE CO. FROM DAMAGES, &C.

And if in the prosecution of said work it shall be necessary to dig up, use, or occupy any street, alley, or public ground of the said city

of Rockport, or of said county of Winnebago, said first party covenants & agrees that he will erect and maintain at all times such *business*, & during the night such lights, as will effectually prevent the happening of any accident or harm to person or property of any individual in consequence of such digging up, use, or occupancy; and further, that he shall be liable for and shall save & keep harmless said second party from all damages in any way arising from the digging up, use, or occupancy of any such street, alley, or public ground, or which may, in any way or to any person, result from the carelessness or neglect of such contractor or his agents, employees, or workmen.

99 REFUSAL TO SELECT ARBITRATOR OR TO ABIDE AWARD, &C.

In case said first party shall neglect or refuse to select an arbitrator, after five days' notice so to do, said building committee may then select two arbitrators, and the two so chosen shall select a third, and the arbitrators so chosen shall proceed to hear & determine the matters in controversy and make their award as provided in said specifications. And in case said first party shall, at any time, neglect or refuse to abide by & fully perform the award of arbitrators rendered in pursuance of this contract & the said specifications, said building committee may, at its discretion, declare the contract forfeited, either as to the whole or any part of the work, and may either relet the same or employ hands and procure said award to be fully & satisfactorily performed, and in either case to charge the same to said first party and deduct & reserve the same from any monies due or to become due him.

PAYMENTS.

And the said party of the second part hereby covenants and agrees, in consideration of the aforesaid covenants & agreements to be
100 kept & performed by said first party, to pay to him when this contract shall be wholly carried out & completed by the said first party, and when the structure shall have been accepted by said building committee, the sum of thirty-nine thousand and ninety-two dollars ($39,092.00) at the time and in the manner provided in said specifications.

In testimony whereof the said party of the first part has hereunto set his hand & seal, and said board of supervisors has caused its signature, by its said building committee, to be hereto affixed the day & year first above written.

JOHN ALLEN. [SEAL.]

Board of supervisors of Winnebago County, by—
JOHN LAKE,
JOHN BEATTIE,
*Building Committee.*

Also a modification of such last-mentioned contract, in the words and figures following, to wit:

101 It is hereby mutually agreed by and between the parties to the above contract that the iron doors to cells, and the lattice iron cross-partition and the doors in the same, in the above contract & specifications mentioned, shall be made wholly of iron.

The iron used therein shall be of the best quality, and of the dimen-

sions and distances apart as shown in plans marked A & B. The said doors & partition shall be constructed & put together in the manner shown in the aforesaid plans A & B, and the whole completed & finished in the most thorough and workmanlike manner, according to the spirit and intent of the above specifications & contract.

It is further mutually agreed and distinctly understood that for making the above change there shall be no additional charge over & above the original contract-price. The locks and hinges and fastenings to the doors above mentioned shall be the same as provided in the original contract.

Dated this first day of August, A. D. 1871.

JOHN ALLEN.
JOHN LAKE.
JOHN BEATTIE.

102 Messrs. John Lake, John Beattie, & F. E. Latham, building committee:

Please pay the several instalments on the within contract, as they may mature, to the order of Gilbert Woodruff & Horace Brown.

Dated Rockford, Ills., September 30th, 1871.

JOHN ALLEN.

103 The defendants then proved the service on one of the plaintiffs personally on the day of , A. D. 1872, of a notice, of which the following is a substantial statement of the purport thereof.

(This notice, in substance, notified the plaintiffs that they would not be permitted to put up in the jail the wrought-iron lattice partition prepared by them for that purpose, for the alleged reason that the same did not conform to the contract & specifications.)

104 The defendants then proved the payment by said Allen to the plaintiffs, to apply on their said contract with said Allen, of the sum of $538.74; also that the said Allen had incurred expenses in and about the reletting of the work for completing the said wrought-iron work not performed by the plaintiffs, to the amount of $100.00.

The plaintiffs then offered in evidence a written agreement between the said Allen and Thos. R. Reeve for the completion of that portion of said wrought-iron work which was left undone by the said plaintiffs, which agreement was in the words and figures following:

105 Copy.

This agreement, made and entered into this 22nd day of July, A. D. 1872, between Thos. R. Reeve, of the city of Cleveland, Ohio, of the first part, and John Allen, of the city of Rockford, Illinois, of the second part, witnesseth: That the said party of the first part, for and in consideration of the payments to be made him in amount, in the manner, and at the times hereinafter specified, has and hereby does promise and agree to and with the said John Allen, that he will provide all the material therefor, and in every respect complete the iron-work upon the Winnebago County jail now in course of construction upon the public square in the city of Rockford, west of Rock River, in Winnebago County, Illinois, such materials to be provided and the work to be done in every respect according to the plans and specifications for said building, drawn and prepared by Cass Chapman, of the city of Chicago, Illinois; that said party of the first part is to provide all the materials and furnish all the abor for th iron-work of said building, except the iron and iron-work

now in place and incorporated into the work now done on said building; the material and workmanship of the part so contracted for by the party of the first part are in every respect to correspond with said plans
106 and specifications therefor; that the party of the first part shall and will, during the construction of said building, erect and put up said iron-work as fast as the building is ready to receive the same, commencing such work on or before the sixth day of August next.

And for the furnishing such materials and performing such labor as above specified, the said John Allen shall and will pay to the said party of the first part the sum of eight thousand six hundred dollars; that said sum shall be paid as follows: when one-fourth of said iron-work shall be in place and accepted by the building committee of the board of supervisors of said Winnebago County, or by said Cass Chapman, the architect who prepared said plans and specifications, the sum of seventeen hundred and twenty dollars, and a like sum when one half of said work shall be in place and so accepted, and the further like sum when three-fourths of said work shall be in place and so accepted; and the balance of said sum or price, being three thousand four hundred and forty dollars, when the whole of the work hereby contracted for shall be in place and accepted by said building committee or said architect.

And the said John Allen further agrees that he will, at his own
107 charge and expense, haul from the depot in the city of Rockford to said jail building all of the material required for the performance of the work hereby contracted for, and that in putting such material in place he will furnish, at his own expense, such extra help as may be required in handling the heavier pieces thereof.

And it is further mutually agreed between the parties hereto that the construction of said jail-building and the putting up of said iron-work shall be so managed, prosecuted, and adjusted by the respective parties as to cause the least possible delay, one to the other, in the performance of the work of constructing and finishing said building.

And it is further mutually agreed that should the building committee of said board of supervisors, during the progress of said work, direct any change in said iron-work, from said plans and specifications, that said party of the first part, receiving reasonable notice, shall and will make the change or changes desired, and if such change or changes shall increase the cost of the performance of said work the party of the first part shall be paid for such increased cost at the same rate or price herein stipulated for the work to be done, and if such change or changes shall decrease
108 the cost of the work to be performed, such decrease shall be deducted from the price hereinbefore stipulated to be paid.

(Signed) THOS. R. REEVE.
W. S. D.
JOHN ALLEN.

In presence of—
ABIAH LATHROP.

109 The said defendants also offered testimony tending to show that said Allen made the most economical arrangement in his power for so completing said work, provided the same was to be done in literal conformity with said specifications and detailed drawings; also evidence tending to show that said Reeve was actually performing the work stipulated for in his said agreement in entire conformity with its provisions and the said specifications and detailed drawings.

After the introduction of the foregoing evidence the defendants asked

the court to instruct the jury that if it appeared from the evidence that the plaintiffs had abandoned their contract with said Allen before its entire completion, and after only a partial performance, that they could not recover in an action on the special contract.

Also, that even if it appeared from the evidence that the plaintiffs, after commencing work under their said contract, had been improperly obstructed in or prevented from the performance of the same, they could not maintain an action on the special contract sued on without proving a tender to said Allen of the balance of the work required to be done by them by their said contract with him.

Also, that if it appeared from the evidence that the payments actually made to the plaintiffs by said Allen added to the amounts required
110 to be paid by him to said Reeve under the aforesaid contract with him, (if such contract was the most economical one that said Allen under the circumstances could make for the completion of said wrought-iron work after the same was abandoned by the plaintiffs,) equalled or excelled the whole price at which the work was to be done by the plaintiff then there could be no recovery.

Also, that the defendants, being mere sureties upon a special written contract, were not necessarily liable even though an action might be sustained against Allen.

Also, that under the facts as disclosed by the evidence, no action was sustainable upon the written contracts mentioned in the declaration, but that the plaintiffs' remedy was limited to an action upon an implied contract on the part of Allen to pay for the value of such work as had been retained by him after it was furnished by the plaintiffs in alleged partial performance of their contract.

Also, that the defendants were not liable upon their guaranty if the plaintiffs were not entitled to recover upon their written contract with Allen.

But the court refused to charge the jury as was so requested on the part of the defendants, or to give any of such instructions, to which
111 refusals and each of them the defendants, by their counsel, then and there duly excepted.

Thereupon the court gave its charge to the jury, the full text whereof was as follows:

112 HAUGH ET AL.
*vs.*
WOODRUFF ET AL.

This is a suit upon a contract made between the defendants and plaintiffs, whereby defendants have guaranteed the performance by one John Allen of all the covenants and undertakings to be performed by Allen in a certain contract bearing date on the 18th of July, 1871, made between plaintiffs as parties of the first part, and Allen as party of the second part, and whereby plaintiffs had agreed to construct for Allen the wrought-iron work in a jail then about to be built at Rockford, in this district and for the building of which Allen was the principal contractor.

To fully understand, then, the obligations and liabilities of the parties under the contract on which this suit is brought, it is necessary to ascertain definitely the duties and obligations which plaintiffs and Allen had respectively assumed under their contract of July 18, as the defendants are certainly not liable to the plaintiffs unless Allen is in default upon his contract, as they are only Allen's sureties. The contract between

plaintiffs and Allen recites in substance that Allen had entered into a contract with Winnebago County to build and complete a jail on the court-house square at Rockford, according to certain plans and
113 specifications prepared by Cass Chapman, an architect, of Chicago, and that copies of said plans and specifications, so far as they related to the wrought-iron work, were then in the hands of plaintiffs.

And the plaintiffs agreed to furnish the material for, manufacture, and deliver and erect in its proper position, all the wrought-iron work for said jail mentioned and provided for in said plans and specifications under the caption of "Specifications for wrought-iron work;" that they would furnish and erect the same as fast as the jail-building should be ready to receive it—stipulating for fifteen days' notice of such readiness—for which Allen was to pay plaintiffs $9,150 in four equal instalments, one-fourth when ¼ work was done; one-fourth when ½ work was done; one-fourth when ¾ work was done, and balance on completion of work—20 p. ct. to be kept back from each pay't till the final completion of work. In case any changes in the iron-work should be required by the building committee having charge of said work, the plaintiffs were to do the work in accordance with such changes, and any increase of cost be made up to them; and in case of decrease of cost by such changes, the decrease was to be deducted from the contract price.

These specifications for wrought-iron work, it will thus be seen, are an important element in the contract between Allen and plaintiffs.
114 Indeed the undertaking on the part of plaintiffs in this contract with Allen is to furnish the materials for, manufacture, and erect in place, the wrought-iron work called for by those specifications in the manner required by the plans and specifications; and it is only by reference to these plans and specifications that we are able to ascertain definitely what plaintiffs agreed to do.

These specifications and the plans and drawings have been so frequently referred to and read, in whole or part, during the examination of witnesses and in the argument of counsel, as to make you familiar with the entire details thereof.

The work thus called for may be briefly described as—

First. A lining for the interior of the jail, which was to be made of boiler-iron plates ¼ inch thick—not less than 24 nor more than 30 inches wide, and in one piece from floor to ceiling.

These plates were to be riveted to angle or T iron bars as might be required in the formation of angles; the T-iron bars to have flanges extending two inches each way, and to weigh not less than 4 lbs. to the lineal foot.

The rivets to be ⅜ inch in diameter, of best Swedes iron, and plates and angle or T iron drilled and countersunk.

2. There was to be an open-work partition.

3. Window frames and sash.

115 Outside window guards with steel rods.
Inside window-guards with iron rods.

4. Cell-doors, combination of angle-iron and interlacing steel bars.
5. Bedsteads.
6. Anchors.
7. Stairs.
8. Water-closets.

The first requisite as to the character of the wrought-iron work, as set forth in these specifications, is that all the iron-work is to be made of the best quality Lake Superior iron, unless otherwise ordered in writing by the superintendent.

The plaintiffs claim that they proceeded, according to the terms of their agreement, to provide the materials and manufacture the iron-work required substantially in the manner called for by the plans and specifications, the most of the work being done at plaintiffs' shop in Indianopolis, and had proceeded to put the iron lining and five of the window-frames in place, and were ready to proceed to put the open work partition, and cell-doors, and other parts of the work in place when they were stopped by said Allen and the building committee in charge of said work. In fact, the plaintiffs insist that they had substantially performed their contract when they were stopped; the work being
115½ then all, or substantially all, made and ready to be put in place.

The defendants besides interposing several technical or, rather, legal defences, arising out of what they claim to be the law of the case on the admitted facts, insist that the work brought upon the ground and offered to be put in place did not conform to the plans and specifications, and that the same was therefore rightfully rejected by Mr. Allen and building committee.

It is admitted that the lining furnished by plaintiffs has been built into the wall since the plaintiffs were stopped in the performance of their contract, and has become apparently a part of the structure without objections from the superintendent or building committee.

It is conceded on the part of the plaintiffs, that in several important particulars this work is not in accordance with the specifications; but it is also insisted that a literal compliance with the specifications and plans in those respects is practically impossible, and they are therefore excused in the premises.

For instance—

It is admitted that the iron used is not known in the market as Lake Superior iron, although the specifications call for Lake Superior iron; and plaintiffs have introduced evidence for the purpose of es-
116 tablishing the fact that there is no such distinctive brand or grade of wrought-iron known to the trade as Lake Superior iron; plaintiffs contending that the Lake Superior ores are largely used in mixture with other ores in the manufacture of iron, and that the iron used by them was made partly from such ores.

So, too, while the specifications call for boiler-plate iron—the plates extending from floor to ceiling—in the construction of the iron-lining it is contended that boiler-plate is not what is generally used in this species of work, and that this expression is inadvertently used in the specifications.

The open-work partition was also made in two sections, intended to be joined by transverse bars or battens when the two sections came together in the middle of the partition.

The lining plates do not extend from floor to ceiling in one sheet, but are made of two or more plates joined together with angle-iron, and in the vertical joints of the iron plates angle-iron was used instead of T-iron, (although, as to the use of angle instead of T iron, I understand plaintiffs as contending that they had their choice or election which to use.)

For want of conformity to the specifications mainly in these particulars which I have enumerated, and also by reason of the imperfection of the workmanship in several particulars, Mr. Allen claimed the right
117 to reject the work tendered by plaintiffs, and it becomes your duty to determine, under the law and the evidence, how far he was right in rejecting said work.

As to the provision requiring all the iron-work to be made "of best

quality Lake Superior iron," it is for you to say, as a matter of fact, from the evidence, whether it was possible for the plaintiff to have literally complied with this condition, or whether, by using iron made partly from Lake Superior ores, this condition has been substantially complied with. Conditions of this nature in contracts or specifications must be construed in the light of practical affairs; and if you find from the evidence that there was no such distinctive article as "Lake Superior iron" known to persons engaged in the iron trade, then you will be justified in assuming that the parties in using the term really meant and intended to describe iron manufactured partly from Lake Superior ores, and if the plaintiffs used such iron they have so far complied with their contract.

In connection with this branch of the case, and as throwing some light upon the construction the parties intended to put upon the term used to describe the material, I call your attention to the fact that, so far as my recollection serves me, there is no proof that any objection was made to the material or kind of iron employed with the exception
118 of the lining plates. The building committee, architect, and Mr. Allen criticised the rivets, the angle-iron, the way the holes were made in the iron, the lack of conformity of the bend or angle in the reticulated bars to the plans, but no fault was found, so far as my recollection of the evidence goes, with the material itself. I call your attention to this circumstance, and you will doubtless give due weight to it.

As for failure to use the kind of plates and T iron bars in the iron lining called for by the specifications, the plaintiffs, if I rightly understand their position, mainly depend upon the consent of Mr. Allen and the building committee to accept the building as made, rather than upon their right to insist that they have complied in that regard with the specifications.

You will remember the evidence on this point. The iron used for the lining was not boiler-iron, but a harder kind of plate-iron, which one of the witnesses called "jail-iron"—perhaps as good a name as any to designate the article used; and the plates did not extend from floor to ceiling, but the strips consisted of two plates joined in the middle by means of angle-iron. When the attention of Mr. Allen and the building committee was called to this defect the plaintiffs admitted the deviation from the specifications, and proposed to make it satisfactory in
119 that particular by putting a batten over the seams.

This, I think, they had the right to do under the clause in the contract which permits changes to be made, although the defendants who had guaranteed Allen's contract were not consulted in relation to this change.

And if you find from the evidence that Mr. Allen and the building committee agreed to accept the lining as made with the plates joined in the middle instead of being continuous from floor to ceiling, and with the angle-iron joint instead of T-iron joints, provided the seam was covered by the batten, then the work as made should be deemed by the jury to have been substituted by agreement of parties for that described in the specifications; the jury taking into consideration, in fixing the value of the work as made, any imperfections in the riveting or other workmanship, and the work yet remaining to be done in order to complete said lining at the time it was abandoned by plaintiffs.

In other words, the jury are to determine from the evidence the value of the lining to Mr. Allen for the purpose of completing his contract as plaintiffs left it.

As for the open-work partition, two objections were taken to it:

1st. That the bars did not extend continuously from floor
120 to ceiling, as shown in plans.

2nd. That the workmanship was imperfect, the angles in the reticulated bars not being turned sharply so as to leave a flat surface resting against the upright bar, and the rivets not being countersunk, as shown in the plan.

You have heard the testimony on all these points, and have had the plans shown and explained to you, and it is for you to say, under the proof, whether this part of the work complied with the contract. If it did not, then Mr. Allen was not bound to accept this partition as part of the work under the contract, and had the right to forbid plaintiffs from putting it up.

A word here in regard to the degree of perfection to which work of this character must be carried to comply with the drawings and plans. The artist who prepares the plans works to an ideal standard of perfection. The mechanic who makes the work is limited by the want of pliability of materials, imperfections in machinery, and to some extent by lack of skilled labour. For these reasons we quite frequently, if not universally, find that the finished work falls, in many respects, much short of the ideal shown in the picture or drawings. But there should always be a substantial compliance with the model. He must produce in all essential particulars the thing represented, and come as near
121 to the standard as the state of the art will allow. His contract binds him to this, and he should not have undertaken the task if he had not the skill or means to accomplish it.

So in regard to the cell-doors, window-frames, and gratings. If the testimony satisfies you that these portions of the work were made by plaintiffs substantially as required in the drawings, and that if the doors are too large for the openings left to receive them, it is due either to the mistake of the mason or to a mistake in the scale on which the drawings were made, then plaintiffs ought not to suffer, and should recover for the value of the window-frames put in place, and also for the value of that ready to be put in place, if it was made in conformity with the drawings, but subject to this reservation.

The contract was an entirety, and the plaintiffs had no right to put in the window-frames, cell-doors, &c., even if they complied in all respects with the drawings and specifications, if they at the same time insisted on putting in the partition also, which did not conform to the plans.

And if you believe from the evidence that the plaintiffs insisted on putting in a partition which was not made according to the plans, then they cannot recover for the doors and window-frames not put up and used, even though they may be properly constructed.

122 If you find from the evidence that the contract has been partially performed by the plaintiffs, and that they have been prevented from performing the remainder of the work by Mr. Allen, and that Mr. Allen has adopted or used a portion of the work, such as the iron lining and five window-frames, then it will be your duty to ascertain from the evidence the value of the work thus done and appropriated, and the plaintiffs will be entitled to recover the value so found as damages in this case; but you should also deduct from the amount thus found any sums due from plaintiffs to Allen for advances made by him on account of plaintiffs, such as freight and cartage paid, or any money paid plaintiffs by Allen on account for said work; also any damages which Allen has sustained by reason of the non-performance of said contract between plaintiffs and Allen, if you believe there was any

breach of said contract which entitles Allen to damages; and in estimating Allen's damages you must be governed by the evidence in the case, applying it in the same manner as you would do if Allen had not a suit for damages on said contract.

And the defendants, by their counsel, then and there duly excepted to each and every proposition of law in said charge contained, because, upon the whole charge the jury were permitted to find a verdict in favour of plaintiffs upon the common counts in the declaration for work
123 and labor and materials furnished, and also especially to each of the following clauses in said charge, to wit:

"As for the open-work partition, two objections were taken to it:

"1st. That the bars did not extend continuously from floor to ceiling, as shown in plans.

"2nd. That the workmanship was imperfect, the angles in the reticulated bars not being turned sharply so as to leave a flat surface resting against the upright bar, and the rivets not being countersunk, as shown in the plan.

"You have heard the testimony on all these points, and have had the plans shown and explained to you, and it is for you to say, under the proof, whether this part of the work complied with the contract. If it did not, then Mr. Allen was not bound to accept this partition as part of the work under the contract, and had the right to forbid plffs. from putting it up.

"A word here in regard to the degree of perfection to which work of this character must be carried to comply with the drawings & plans. The artist who prepares the plans works to an ideal standard of perfection. The mechanic who makes the work is limited by the want of pliability of materials, imperfections in machinery, and to some extent by lack of skilled labour. For these reasons we quite frequently, if
124 not universally, find that the finished work falls, in many respects, much short of the ideal shown in the picture or drawings. But there should always be a substantial compliance with the model. He must produce in all essential particulars the thing represented, and come as near to the standard as the state of the art will allow. His contract binds him to this, and he should not have undertaken the task if he had not the skill or means to accomplish it."

"If you find from the evidence that the contract has been partially performed by the plffs., and that they have been prevented from performing the remainder of the work by Mr. Allen, and that Mr. Allen has adopted or used a portion of the work, such as the iron lining and 5 window-frames, then it will be your duty to ascertain from the evidence the value of the work thus done & appropriated, and the plffs. will be entitled to recover the value so found as damages in this case; but you should also deduct from the amount thus found any sums due from plffs. to Allen for advances made by him on a/c of plaintiffs, such as freight, & cartage paid, or any money paid plffs. by Allen on a/c for said work; also any damages which Allen has sustained by reason of the non-performance of said contract between plffs. and Allen, if you believe there was any breach of said contract which entitles
125 Allen to damages, and in estimating Allen's damages you must be governed by the evidence in the case, applying it in the same manner as you would do if Allen had not a suit for damages on said contract."

Thereupon the jury gave their verdict in favor of the plaintiffs for $5,000 damages.

And afterwards, a motion for a new trial having been made & argued by counsel on both sides. the court overruled such motion, & gave judgment against the plaintiffs on the verdict.

And inasmuch, &c.

H. W. BLODGETT,
*Dist. Judge.*

(Endorsed:) Filed January 8th, 1873. Wm. H. Bradley, clerk.

126 And afterwards, to wit, on the 20th day of January, A. D. 1873, the following supersedeas bond was filed in said court, and reads in the words and figures following, to wit:

Circuit court of the United States.

BENJAMIN F. HAUGH, JOSEPH R. HAUGH, AND Thomas H. Butler,
*v.*
GILBERT WOODRUFF, HORACE BROWN, AND George S. Haskell.
} In error.

Know all men by these presents that we, Gilbert Woodruff, Horace Brown, and George S. Haskell, of the county of Winnebago, & State of Illinois, as principals, and Henry Knowles, as surety, are held and firmly bound unto Benjamin F. Haugh, Joseph R. Haugh, and Thomas H. Butler in the penal sum of eight thousand dollars, to the payment of which well and truly to be made to the said obligees, their representatives and assigns, we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents,
127 sealed with our seals and dated this 16th day of January, A. D. 1873. The condition of the foregoing obligation is such that, whereas the above-named principal obligors have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the said circuit court in the above-entitled cause at the December term thereof for the year A. D. 1872: Now, therefore, if the said principal obligors shall prosecute their said writ of error to effect, & answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise of force.

GILBERT WOODRUFF. [SEAL.]
HORACE BROWN. [SEAL.]
GEO. S. HASKELL. [SEAL.]
HENRY KNOWLES. [SEAL.]

In presence of—
H. H. WHITON.

(Endorsed:) Approved. H. W. Blodgett, judge.
Filed Jan'y 20, 1873.

WM. H. BRADLEY, *Clk.*

128 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings had in the cause wherein Benjamin F. Haugh et al. are the plaintiffs and Gilbert Woodruff et al. are the defendants, as the same appears from the records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said district, this 23d day of September, A. D. 1873, and of our Independence the 98th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

129 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the records and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Benjamin F. Haugh, Joseph R. Haugh, and Thomas H. Butler, plaintiffs, and Gilbert Woodruff, Horace Brown, and George S. Haskell, defendants, a manifest error hath happened to the great damage of the said Gilbert Woodruff, Horace Brown, and George S. Haskell, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the records and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

130 Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this tenth day of January, A. D. eighteen hundred and seventy-three, and of our Independence the ninty-seventh year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsed:) Circuit court U. S., northern dist. of Illinois. Benjamin F. Haugh et al. vs. Gilbert Woodruff et al. Writ of error.

131 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Benjamin F. Haugh, Joseph R. Haugh, & Thomas H. Butler, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Gilbert Woodruff, Horace Brown, and George S. Haskell are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected & speedy justice should not be done to the parties in that behalf.

Witness Henry W. Blodgett, district & presiding judge of said circuit court, this 6th day of August, A. D. 1873.

H. W. BLODGETT, *Judge.*

132 (Indorsed:) N. D. Ill., cir. ct. U. S. Gilbert Woodruff et al. vs. Benj. F. Haugh et al. Citation. Sleeper & Whiton, attys. of plffs. in error.

A copy of the within citation was served on us this 6th day of August, A. D. 1873.

JEWETT & ADAMS,
*Attys. for Plffs.*

*Assignment of errors.*

133 Supreme Court of the United States, of October term, A. D. 1873.

GILBERT WOODRUFF, HORACE BROWN, & George S. Haskell, plffs. in error,
*vs.*
BENJ. F. HAUGH, JOSEPH R. HAUGH, & THOMAS H. Butler, defts. in error.

Afterwards, to wit, on the 2nd Monday of October, A. D. 1873, before the justices of the Supreme Court of the United States, in the Capitol, at the city of Washington, came the said plaintiffs in error, by J. A. Sleeper, their attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit:

I. The court below erred in refusing to charge the jury in the manner requested by the counsel of the plaintiff in error, as set forth in the bill of exceptions.

II. The court below erred in giving its charge to the jury, especially in those clauses of the charge which were specially excepted to,
134 as mentioned in the bill of exceptions.

III. The court below erred in permitting a recovery as upon a quantum meruit, when the evidence showed that the defendants in error had not performed their special contract, as set forth in their declaration.

IV. The court below erred in not fairly submitting to the jury the question whether, under the evidence, Allen was not justified in entering into a new contract with Reeve, and charging them that if Allen was so justified, then the extra cost incurred by him in procuring Reeve to finish the work should be taken into account in estimating the amount fairly due the defendants in error.

V. The verdict of the jury was plainly excessive under the evidence, & the court below erred in not granting a new trial for that reason.

VI. The court below erred in refusing to grant a new trial for
135 the errors herein referred to, & others apparent on the record.

And the said plaintiffs in error pray that the judgment aforesaid may be reversed & for naught held, & that they may be restored to all things which they have lost by occasion of said judgment.

J. A. SLEEPER,
*Atty. of Plffs. in Error.*

(Indorsement on cover:) No. 301. Gilbert Woodruff, Horace Brown, and George S. Haskell, plaintiffs in error, vs. Benjamin F. Hough, Joseph R. Hough, & Thomas H. Butler. N. Illinois C. C. U. S. Filed 23 October, 1873.

# Supreme Court of the United States.

## OCTOBER TERM, A. D. 1875.

*GILBERT WOODRUFF, HORACE BROWN & GEO. S. HASKELL,*
PLFFS. IN ERROR,
*vs.*
*BENJ. F. HAUGH, JOSEPH R. HAUGH & THOMAS H. BUTLER,*
DEFTS. IN ERROR.

*No.*

## *BRIEF FOR PLAINTIFFS IN ERROR.*

SLEEPER & WHITON, Att'ys

Stillman & Benedict, Printers, 166 Washington Street.

# Supreme Court of the United States.

## OCTOBER TERM, A. D. 1875.

*GILBERT WOODRUFF, HORACE BROWN & GEO. S. HASKELL,*
PLFFS. IN ERROR,
*vs.*
*BENJ. F. HAUGH, JOSEPH R. HAUGH & THOMAS H. BUTLER,*
DEFTS. IN ERROR.
} *No.*

## *BRIEF FOR PLAINTIFFS IN ERROR.*

## I.

### STATEMENT OF THE CASE.

ONE John Allen had entered into a contract on July 5th, 1871, with the Board of Supervisors of Winnebago county, Illinois, to erect for such county a jail, (transcript p. 14), and in order to complete the same, on July 18th, 1871, he made a further sub-contract with the defendants in error, by which they agreed to furnish him all the *wrought iron work* necessary in the construction of such building for the stipulated price of $9,150.00, (transcript p. 3).

On the day of the date of this contract with the defendants in error, the plaintiffs in error guaranteed its performance by Allen in the following form, (transcript p. 4).

"In consideration of the making of the foregoing agree-
"ment by the said Benj. F. Haugh, Joseph R. Haugh and
"Thomas H. Butler, we, Gilbert Woodruff, Horace Brown and
"George S. Haskill of the City of Rockford, Illinois, do
"hereby guarantee the faithful performance of the said agree-
"ment on the part of the said John Allen.

"Witness our hands this 18th day of July, A. D. 1871.

(Signed,) GILBERT WOODRUFF,
HORACE BROWN,
GEO. S. HASKILL."

The action was brought on this guaranty, and the declaration contained 3 special counts, besides the common counts, to which a plea of the general issue was interposed. (See transcript, pp. 3 to 13.)

Allen's contract with the Board of Supervisors for the erection of the jail, contained among others, these provisions:

"Said work to be done *in accordance with plans prepared for doing the same by Cass Chapman, of Chicago, Illinois, and now in the hands of said Committee, and with the specifications appended hereto, and made a part of this contract.*" (Transcript p. 31.)

"And said first party hereby covenants and agrees to perform all of said work *under the general direction and control of said building Committee, and under the immediate personal supervision and direction* of John Beatty, as *Superintendent*, or of such other Superintendent as said second party may appoint." (*ibid.*)

"All materials used and work done shall be *subject to the inspection and approval of the aforesaid Superiutendent, and if at any time in his judgment the work being done or materials being furnished and used shall not be in accordance with the requirements of this contract, and the aforesaid plans and specifications, he shall have power to stop the work* until the difference shall be adjusted as provided by arbitration in said specifications." (Transcript p. 32.)

"And the said party of the second part hereby covenants and agrees in consideration of the aforesaid covenants and agreements to be kept and performed by said first party to pay to him when this contract shall be *wholly carried out and completed by said first party and when the structure shall have been accepted by said building committee,* the sum of $36,092,00 at the time and in the manner provided in said specifications" (transcript 33.)

The contract for the wrought iron work made by Allen witn the defendants in error contained the following recitals and stipulations.

"Whereas the said John Allen on the 5th day of July A, D, 1871 entered into an agreement with the board of Supervisors of the County of Winnebago in said state of Illinois to erect and complete a jail building for said County of Winnebago to be located on the Court House square in said City of Rockford and to be completed on ths first day of April 1872, and to be built according to the plans and specifications prepared by Cass Chapman, an Architect of Chicago, Ills., *one* copy of which is now in the possession of the building committee of said Board of Supervisors in charge of the construction of said jail and *a copy of which so far as they extend to the wrought iron work for said jail has been furnished to the party*

*of the first part* and whereas the said party of the second part is desirous of having the said party of the first part do the wrought iron work for said jail and enter into an agreement in that behalf;

Now therefore this agreement witnesseth that the said party of the first part in consideration of the sum of money to be paid to them by the party of the second part as hereinafter provided, do hereby promise and agree to and with the said party of the second part that they will *furnish the material for, manufacture, deliver, and erect in its proper position, all of the wrought iron work for the aforesaid jail, mentioned and provided for in the aforesaid plans and specifications* under the caption of "specifications for wrought iron work," and that they will furnish and erect the same as fast as the said jail building shall be ready to receive the same, and they shall have had 15 days notice in writing of such readiness.

And the said party of the second part promises and agrees to pay to the said party of the first part for the wrought iron work aforesaid the sum of $9,150,00 and to pay the same in 4 equal payments as the work progresses, reserving 20 per cent of each installment *until the completion of the building*, that is to say: When ¼ of said iron work shall be completed there shall be paid ¼ of the aforesaid sum of $9,150, less 20 per cent. of said ¼ and thereafter on the completion of each successive ¼ of said iron work there shall be paid a ¼ of the aforesaid sum of $ 9150, less 20 per cent of each ¼ until the whole iron work is completed, and *when said jail building shall be completed* the remainder of said sum of $9,150, including said reserved 20 per cent. shall be fully paid" (transcript 3.)

In the specifications for wrought iron work referred to,

the following were the provisions as to the *side lining* of the jail.

"The sides of the jail room and center partitions lengthwise of the jail will be lined with boiler iron plates one-fourth of an inch thick, not less than 24 nor more than 30 inches wide, and *in one piece from floor to ceiling*. These plates will be riveted to angle (L) or T iron bars as may be required in the formation of angles," &c.

"For the center open work partition, crosswise the jail, propositions will be received for the perpendicular 1½ inch bars, and for the latticed work as represented by the detail drawings, the building committee reserving the right to adopt either." (Transcript p. 26.)

The Committee adopted the *lattice plan*, and on the large detailed drawings accompanying the specifications given to the defendants in error, before they commenced their work, the *side linings* were shown as described in the specifications, while the open iron partition was represented as a lattice work in which a majority of the angles formed by the lattice bars were brought to a flat, smooth bearing of about 1½ inches in length, and the bearings were riveted together through drilled holes countersunk at each end for 5-8 inch rivets which were countersunk on both sides. (Transcript p. 29.)

(The rough diagrams at the end of this brief will illustrate the form of the bearings and mode of riveting provided for in the contract, as well as the form and mode in the partition offered by the defendants in error in pretended compliance with the contract.)

It appeared on the trial below that shortly after the defendants in error commenced putting up the wrought iron work,

the architect and superintendent began to complain that it was not in accordance with the plans and specifications, and particularly that the side linings which were to be of entire sheets, extending from floor to ceiling, were made not only of inferior iron, but of 2 plates riveted together, thus making a seam midway between the floor and ceiling, while the plates thus formed were riveted back to two angle irons placed back to back, thus ⊥⊥.—instead of to a single bar of T iron, thus—⊥, as required by the contract.

Some changes were made in the mode of fastening the plates in position and the lining was allowed by the architect and superintendent to remain, although they claimed that such work was inferior to that required by the contract. (Transcript p. 30.)

It further appeared on the trial that when the open lattice partition was brought on the ground to be placed in said jail, the architect and superintendent positively refused to permit the same to be used, on the ground that it was not in conformity to the detailed drawings and plans, in that the vertical sections were not entire, from floor to ceiling, but made in two parts to be united midway between floor and ceiling by riveting, and also because the angles formed by the lattice bars were not brought to the flat, smooth bearing required by the contract, nor were the holes for rivets at the angles countersunk, but the angles were left with a curved bearing resulting from an ordinary bend of the iron, and the holes for the rivets through the angles were merely punched and not countersunk. It also appeared that the defendants in error refused to make such lattice partition any different from that which had been prepared by them in this manner, and claimed that it was in substantial conformity to said plans and specifications, and in-

sisted on putting it up in position in the jail, but the said architect and superintendent still refusing to permit this to be done unless such lattice work was made to conform to the drawings and specifications, the defendants in error immediately abandoned the further attempt to perform their contract, and brought this suit. (Transcript p. 30.)

The defendants in error offered evidence tending to show that the linings and lattice partition prepared by them would prove as serviceable as if made in full conformity with the specification and drawings.

It also appeared that at the time when the defendants in error abandoned their contract as stated, there remained to be constructed and put in position a considerable portion of said jail linings and other work, provided to be done by them in their contract, in addition to said lattice partition.

There was also testimony which tended to show that the jail linings, (but not the lattice partition), were accepted by the architect and superintendent, and objections to their mode of manufacture waived. (Transcript 30.)

It further appeared that prior to the abandonment of their contract by the defendants in error, they had received from Allen $538.74 to apply on the work. (Transcript p. 34.)

It further appeared from Allen's contract with the Supervisors that he was bound to have the jail completed by April 1, 1872, and it contained this recital—" the time of commencement, rate of progress and time of completion being essential conditions of this contract." (Transcript p. 31.)

After the defendants in error refused to proceed further with their contract with Allen, he undertook to procure the completion of the wrought iron work through other parties,

and to that end at an expense of $100, he went to Cleveland and there on July 22, 1872, entered into a new contract with one Thos. R. Reeve who undertook for the consideration of $8600, to complete the work which had been undertaken by the defendants in error. (See this contract, transcript 34.)

The testimony also showed that Allen made the most economical arrangement in his power for so completing said work provided the same was to be done in strict conformity with said specifications and drawings, and it also appeared that Reeve was at the time actually performing the work stipulated for in his said contract in entire conformity with its provisions and the said specifications and drawings. (Transcript p. 35.)

---

Upon the case as thus presented the defendants in error asked of the Court the following charges to the Jury.

1. That if it appeared from the evidence that Haugh & Co. the plaintiffs, had abandoned their contract with Allen before its entire completion and after only a partial performance that then they could not recover in an action on the special contract.

2. That even if it appeared from the evidence that Haugh & Co. after commencing work under their contract had been improperly obstructed in, or prevented from the performance of the same they could not maintain an action on the special contract sued on without proving a tender to Allen of the balance of the work required to be done by them under their contract with him.

3. That if it appeared from the evidence that the payments actually made to Haugh & Co. by Allen added to the

amounts required to be paid by him to said Reeve under the contract with him,(if such contract was the most economical one that Allen under the circumstances could make for the completion of the wrought iron work after the same was abandoned by Haugh & Co). equalled or exceeded the whole price at which the work was to be done by Haugh & Co. then there could be no recovery by them.

4. That the defendants (plaintiffs in error) being mere sureties upon a special written contract, were not necessarily liable even though an action might be sustained against Allen.

5. That under the facts disclosed in evidence no action was sustainable upon the written contract mentioned in the declaration, but that the plaintiffs remedy if any was limited to an action upon an implied contract on the part of Allen to pay a reasonable sum for the value of such work as had been retained by him, after it was furnished by Haugh & Co. in alleged partial performance of their contract.

6. That the defendants (plaintiffs in error) were not liable upon their guaranty if Haugh & Co. were not entitled to recover upon their written contract with Allen.

But the Court refused to give the said instructions, or any of them, and to such refusal the plaintiffs in error by their counsel duly excepted. (Transcript p. 36.)

As the errors complained of are mainly confined to the refusal of the Judge to give any of the instructions asked by the plaintiffs in error, and to the propositions of law embraced in the actual charge given, it seemed necessary to insert in the record *the entire charge*, that this Court might see whether such instructions as were asked by the plaintiffs in error, and

to which they may appear to have been entitled, were really given in that charge. (See charge, transcript p. 36.)

At the close of the charge to the jury, the plaintiffs in error in presence of the Court, and before the jury retired to consider of their verdict, took the following exceptions to such charge.

To the charge in its entire scope, because it permitted the jury to find a verdict in favor of the plaintiffs upon the common counts in the declaration for work and labor and materials furnished.

Also, to the following clause in said charge:

"As to the open work partition two objections were taken to it: 1st—That the bars did not extend continuously from floor to ceiling, as shown in plans. 2d—That the workmanship was imperfect, the angles in the reticulated bars not being turned sharply so as to leave a flat surface resting against the upright bar, and the rivets not being countersunk as shown in the plan. You have heard the testimony on these points, and have had the plans shown and explained to you, and it is for you to say under the proof whether this part of the work complied with the contract.

If it did not, then Allen was not bound to accept this partition as part of the work under the contract, and had the right to forbid the plaintiff putting it up.

A word here in regard to the degree of perfection to which work of this character must be carried to comply with drawings and plans. The artist who prepares the plans, works from an ideal standard of perfection. The mechanic who makes the work is limited by the want of pliability of materials, imperfections in machinery, and to some extent by the lack of

skilled labor. For these reasons we quite frequently if not universally find that the finished work falls in many respects much short of the ideal shown in the picture or drawings.

But there should always be a substantial compliance with the model, he must produce is all essential particulars the thing represented, and come as near to the standard as the state of the art will allow. His contract binds him to this, and he should not have undertaken the task if he had not the skill or means to accomplish it."

Also the following clause in the charge:

"If you find from the evidence that the contract has been partially performed by the plaintiffs, and that they have been prevented from performing the remainder of the work by Mr. Allen, and that Mr. Allen has adopted or used a portion of the work such as the iron lining and five window frames, then it will be your duty to ascertain from the evidence the value of the work thus done and appropriated, and the plaintiffs will be entitled to recover the value so found as damages in this case, but you should also deduct from the amount thus found, any sums due from plaintiffs to Allen for advances made by him on account of plaintiffs, such as freight and cartage paid, or any money paid plaintiffs by Allen on account for said work, also any damages which Allen has sustained by reason of the non-performance of said contract between plaintiffs and Allen, if you believe there was any breach of said contract which entitles Allen to damages, and in estimating *Allen's damages*, you must be governed by the evidence in the case, applying it in the *same manner as you would do if Allen had a suit for damages on said contract*."

## II.

### The Errors Assigned.

The bill of exceptions shows an agreed statement of facts upon which the questions of law in this case arise, and our previous recital of those facts, with allusions to the exceptions to what the Judge charged and what he refused to charge, has indicated the following errors upon which we rely to reverse the judgment.

The Court below erred in refusing to give to the jury the several instructions or any of them, asked by the plaintiffs in error. (transcript 36.)

2. Such Court also erred in its charge to the jury, in those clauses specially excepted to as heretofore mentioned. (transcript 41.)

3. The Court erred in the whole theory and scope of its charge in permitting a recovery against these sureties as upon a *quantum meruit* when the evidence showed that the defendants in error had not performed or offered to perform their special contract.

4. The Court erred in not properly distinguishing in its charge to the jury between the liability of Allen to the defendants in error, and that of his sureties, the defendants in error, and in fact making no distinction, but permitting the jury to find a verdict against the defendants in error for any sum they might find due from Allen, on a *quantum meruit* under the common counts in the declaration .

5. The Court erred in submitting to the jury the question

whether there had been a substantial performance of the contract by Haugh & Co., with Allen, when the evidence was undisputed, that in the matter of the lattice partition, there had not been any attempts at compliance, but, on the contrary, Haugh & Co. had expressly refused to make such attempts, and because they could not get the county authorities to accept a different sort of partition from that stipulated for in the contract, they abandoned the work, after an unsatisfactory performance of a portion of it.

Also, for the further reason that the decision of the county authorities in rejecting such partition, for non-conformity to the contract was final, and bound all parties, in the absence of fraud in such rejection.

6. The court erred in treating in its charge to the jury the claims of Haugh & Co., as *all due*, under their contract, whereas the contract was divisible, and there can be no claim that a number of the installments, mentioned to be paid in the contract, were due either when the suit was brought or tried, and especially the 20 per cent. which was reserved till the jail was completed.

7. The Court erred in holding these guarantors liable in this action in the absence of proof of any notice to them that Haugh & Co. had performed the conditions upon which they were to be entitled to payments from Allen, and that Allen had made default.

8. The charge of the court was calculated to mislead the jury, as to the true issues, and the result was an excessive verdict.

## *III.*

### Brief and Argument for Plaintiffs in Error.

Before proceeding to notice in some detail the legal objections to the judgment in question, we beg to direct the attention of the Court to the great practical injustice to which our clients, and Allen their principal will be subjected, if it is affirmed in this Court.

The original contract of Allen with Haugh & Co. entitled Allen to have all the wrought iron work for the jail at a stipulated price of $9,150.

Has Allen, or these sureties for him, done anything that should preclude Allen from having this wrought iron work from Haugh & Co. at the stipulated price. Neither Allen nor his sureties, as Haugh & Co. well knew in undertaking their work, had anything to do with passing upon the sufficiency of Haugh & Co's. performance, for while Allen and his sureties, (looking to their own interests,) would doubtless have been glad to have the County authorities accept the sort of performance proposed, yet their hands were tied, and Haugh & Co. had agreed to furnish their work under a contract that provided "that all materials used and all work done shall be subject to the inspection and approval of the aforesaid superintendent, and if at any time in his judgment, the work being done or materials being furnished and used shall not be in accordance with the requirements of this contract and the aforesaid plans and specifications, he shall have power to stop the work," &c. In their contract with Allen they expressly stipulated that they would "furnish the materials for, manufacture, deliver and erect in its proper

position, all of the wrought iron work for the aforesaid jail mentioned and provided for in the aforesaid plans and specifications under the caption of specifications for wrought iron work," &c., a copy of Allen's contract with the county, and the plans and specifications, so far as they related to this wrought iron work, was appended to the contract with Haugh & Co., and they knew Allen could get no pay from the county unless he performed his contract, and they *undertook to do Allen's work as to this wrought iron work, to the satisfaction of the architect and superintendent.*

Now look at the result to Allen if this judgment shall stand:

| | |
|---|---|
| Under the most economical arrangement he could make, he was compelled to hire Reeve to finish the work undone by Haugh & Co. at a cost of - - | $8,500.00 |
| The judgment in this case was - - | 5,00000 |
| He had paid Haugh & Co. on their contract, - | 538.74 |
| Add a moderate estimate for traveling expenses, time spent in getting the work finished by Reeve, loss of time and other incidentals, - | 961.26 |
| | $15,000.00 |

Can any good reason be shown why Allen should pay $15000 for what Haugh & Co. agreed to furnish him at $9150? Wherein was he in default that so heavy a penalty should be visited upon him? He can have no recourse upon the County, for its authorities only exercised an unquestionable right under the contract; and under the stipulations in the contract the decision of those authorities on the character of the work tendered by Haugh & Co. was not reexaminable, even though there might have been strong suspicions of the propriety of those decisions, which was by no means the case.

When it is proposed that results of the character indicated shall be worked out under the processes of the law, we are justified in scrutinizing the legal rules which are supposed to sanction so transparent a wrong.

1. Assuming for the purposes of argument as did the Court below, that there is no difference in the measure of legal liability between Allen and his sureties upon the contract with Haugh & Co. we will *first inquire whether Allen himself* would have been liable to Haugh & Co. on the special contract if this action had been brought against him, and not against his sureties.

We affirm that the evidence makes it plain beyond controversy that Haugh & Co. under the evidence could not have maintained an action on the special contract against Allen.

Although there has been much controversy and some want of harmony in the decisions of various Courts as to what shall be held to preclude a party from suing on a special contract not performed, and to leave him to an *indebitatus* for the value of his labor and materials, yet we believe that no case can be found in the reports where a recovery on the special contract was allowed where party undertaking to do specific work minutely described in plans and specifications as in the present case, *abandoned it when half performed because he could not get the party with whom he had contracted to accept a thing which he claimed to be equally serviceable*, for the thing required by the contract.

And yet this is precisely the aspect of this case. Haugh &

Co. were forbidden to put up the partition which they had prepared, and which bore scarcely a semblance to the requirements of the contract. They acknowledge that they refused to to change the partition as prepared by them, and that they abandoned further attempts to complete their contract because the county authorities would not accept a different partition from the one they contracted for.

To allow a recovery on the special contract under such a state of facts would be as absurd, as to permit a recovery on a contract for building a house of *stone* when a tender of *brick* in lieu of stone was made, on the theory that it was equally serviceable, and when the performance was abandoned because the brick was not accepted.

When a man employs a builder to erect for him a house, according to plans and specifications, the owner is entitled to demand that even his whims, if stipulated for in the contract, shall be faithfully carried out, and many respectable Courts hold that if they are not, and the builder takes the responsibility of departing from the contract in constructing a building, in a material matter, he shall not even be allowed. on a *quantum meruit*, the value of his labor and materials, though appropriated by the owner.

*Champlin vs. Rowley*, 13 Wend., 285; 18 do, 187.
*Smith vs. Brady*, 17 N. Y., 173.
*Withrow vs. Withrow*, 16 Ohio, 238.
*2 Parsons' Conts.*, 522, 524 n., 658 n.

It cannot be pretended that the change proposed by Haugh & Co. in the manufacture of the partition was an immaterial matter.

That partition was half their whole contract, and to say

that dividing it into two sections midway between floor and ceiling, to be held together by rivets, and forming the angles in the mode proposed by Haugh & Co. would result in making an equally serviceable job for the uses intended, to that contemplated in the contract, is absurd.

Haugh & Co. acknowledge that they could have made the partition strictly according to contract, and Reeve the new contractor did so make it, but Haugh & Co. allege that the price at which they took the work would not justify them in following the contract; but if so, why did they bid, and so prevent some honest contractor getting the contract at a fair price. They proposed to underbid competitors, and make money, by an inferior performance.

The County authorities had a right to reject the partition tendered by Haugh & Co. or they had not. If they had the right, then it cannot be pretended that Haugh & Co. can maintain an action on the special contract; or indeed in any form of action. *Dermott vs. Jones 2 Wall., 1.*

If they had not, then Haugh & Co. could only retain a right to sue on the special contract by tendering all the residue of the wrought iron work which they contracted to furnish, and then waiting before bringing suit until their installments and retained percentage fell due under the contract. As they did not do this of course their remedy if any is outside of the written contract which they had not performed or offered to perform, though they were in no way obstructed by any one.

This was an Illinois contract and it is well settled in the Courts of that state that where there is a written contract and the same is only partially performed, as in this case, the party abandoning the work cannot sue in *indebitatus* for the value of

his labor and materials, unless he can show an abandonment of the written contract by *mutual consent* or that he was *prevented* from fulfilling the written contract by some act of the party with whom he contracted.

*See Phelps vs. Hubbard*, 59 Ills, 79, and cases cited.
And see *2 Parsons' Conts., 56.*

Besides if a proper tender of all the work had been made by Haugh & Co. they were not entitled to sue on the written contract, till the work was accepted by the *umpire* whose decision was to be final as to the proper performance of the work

*2 Parsons Conts.*, 59.
*Martin vs. Leggett*, 4 E. D. Smi
*Smith vs. Briggs*, 3 Denio, 73.
Hudson v. McCartney 32 Wis. 331. Bannister v. Patty

So in every aspect of this suit it was only main the theory that Allen was liable on a *quantum meru* portion of Haugh & Co's. work he had actually appropriated, after a mutual abandonment of the contract, but as we have shown there never was such an abandonment, and even if the partition tendered by Haugh & Co. was improperly rejected, and such rejection were reviewable after the action of the county authorities, still there was *no attempt* to tender the *balance of the work* provided for in the contract on the part of Haugh & Co. so that even in this view of the facts an action on the written contract could not be maintained. (As to when a party bound by a written contract may resort to a general assumpsit, see notes to *Cutter vs. Powell*, 2 Smith's L. C. 49.)

If it is clear, then, that there was no performance or offer to perform this special contract by Haugh & Co., and no prevention of performance by Allen or the county authorities, and no legal excuse for non-performance, we cannot see how any action

that dividing it into two sections midway between floor and ceiling, to be held together by rivets, and forming the angles in the mode proposed by Haugh & Co. would result in making an equally serviceable job for the uses intended, to that contemplated in the contract, is absurd.

Haugh & Co. acknowledge that they could have made the partition strictly according to contract, and Reeve the new contractor did so make it, but Haugh & Co. allege that the price at which they took the work would not justify them in following the contract; but if so, why did they bid, and so prevent some honest contractor getting the contract at a fair price. They proposed to underbid competitors, and make money, by an inferior performance.

The County authorities had a right to reject the partition tendered by Haugh & Co. or they had not. If they had the right, then it cannot be pretended that Haugh & Co. can maintain an action on the special contract; or indeed in any form of action. *Dermott vs. Jones 2 Wall., 1.*

If they had not, then Haugh & Co. could only retain a right to sue on the special contract by tendering all the residue of the wrought iron work which they contracted to furnish, and then waiting before bringing suit until their installments and retained percentage fell due under the contract. As they did not do this of course their remedy if any is outside of the written contract which they had not performed or offered to perform, though they were in no way obstructed by any one.

This was an Illinois contract and it is well settled in the Courts of that state that where there is a written contract and the same is only partially performed, as in this case, the party abandoning the work cannot sue in *indebitatus* for the value of

his labor and materials, unless he can show an abandonment of the written contract by *mutual consent* or that he was *prevented* from fulfilling the written contract by some act of the party with whom he contracted.

*See Phelps vs. Hubbard*, 59 Ills, 79, and cases cited.
And see *2 Parsons' Conts., 56.*

Besides if a proper tender of all the work had been made by Haugh & Co. they were not entitled to sue on the written contract, till the work was accepted by the *umpire* whose decision was to be final as to the proper performance of the work

*2 Parsons Conts.*, 59.
*Martin vs. Leggett*, 4 E. D. Smith, 255.
*Smith vs. Briggs*, 3 Denio, 73.

Hudson v. McCartney 32 Wis. 331. Bannister v. Patty's Exrs. 35 do. 215.

So in every aspect of this suit it was only maintainable on the theory that Allen was liable on a *quantum meruit* for what portion of Haugh & Co's. work he had actually appropriated, after a mutual abandonment of the contract, but as we have shown there never was such an abandonment, and even if the partition tendered by Haugh & Co. was improperly rejected, and such rejection were reviewable after the action of the county authorities, still there was *no attempt* to tender the *balance of the work* provided for in the contract on the part of Haugh & Co. so that even in this view of the facts an action on the written contract could not be maintained. (As to when a party bound by a written contract may resort to a general assumpsit, see notes to *Cutter vs. Powell*, 2 Smith's L. C. 49.)

If it is clear, then, that there was no performance or offer to perform this special contract by Haugh & Co., and no prevention of performance by Allen or the county authorities, and no legal excuse for non-performance, we cannot see how any action

can be maintained by Haugh & Co. against Allen, even on a *quantum meruit* for the value of the labor and materials *actually appropriated* by Allen and the county.

*Slater vs. Emerson, 19 How., 239.*
*2 Parsons' Conts., 522. 524, 658, and notes.*

But if we concede such an action, there was no foundation for a verdict of $5,000 against Allen. All that the county and Allen had appropriated was the *side-lining* to the jail, which, though different from and inferior to the requirements of the contract, the county authorities concluded to retain, but there is no pretense that they or Allen ever accepted or appropriated the *partition*, but on the contrary they got Reeve at a large cost to build a new one in conformity with the contract.

Allen had paid Haugh & Co. $538.74, and adding this to the verdict, will it be pretended that the defective side-lining was worth $5,538.74. The contract price for the whole work was $9,150, which would leave only $3,611.26 as the value of all the other wrought iron work, including the partition, for which Reeve received $8,600. It is plain that the jury misled by the charge of the Court, added to their estimate of the value of the side-lining, an estimate of the supposed value of the rejected partition, leaving this balance of $3,611.26 to cover defects in the work, and to procure the balance of the wrought iron work which Haugh & Co. did not pretent to have manufactured.

The verdict is also objectionable because it leaves in doubt the ownership of the partition prepared by Haugh & Co. They left it on the ground near the jail, where it still lies, and altho' the county authorities positively refused to have anything to do with it, yet doubtless the jury took the view that it belonged to the county, and so charged its supposed value to these sureties in their verdict. The Court in its charge should have

instructed the jury that inasmuch as the partition did not conform to the contract, neither Allen or his sureties were liable for its value, and that because no legal excuse was shown by Haugh & Co. for abandoning the work on the non-acceptance of the partition, no action in any form was maintainable against Allen or his sureties.

*Dermott vs. Jones, 2 Wall., 1.*
*Phelps vs. Hubbard, 59 Ills., 79.*

2. But if we have demonstrated that in an action by Haugh & Co, against Allen, their recovery would necessarily be limited to a *quantum meruit* for the value of the labor and materials actually appropriated, it by no means follows that the liability of thesc sureties is commensurate with that of Allen. On the contrary it is clear that their guaranty does not extend to any liabllity upon a mere *quantum meruit*. They guaranteed that if Haugh & Co. should furnish Allen certain specified work in a specified manner, that Allen would pay for it in a specified way, and it seems to us most illogical to claim that they likewise guaranteed that Allen should pay any balance that might be found due Haugh & Co. from Allen *outside* of the written contract. As to such matters they may say, "*non hæc in fœdera veni.*"

A contrary doctrine would confound all distinctions, and a surety would never know what liability he had really assumed, for such balance might prove to be much greater than the original contract price. But the rule is well settled that the liability of the surety is *strictissimi juris*, and he cannot be held liable as a surety on a dependent contract, unless the conditions

upon which his principal is to become liable, are literally performed.

*2 Parsons' Conts., 3 et seq.*
*2 Am. L. C.*, 362 to 482.
*Smith vs. U. S.*, 2 Wall., 235.

A guarantor must be sued *specially* on the guaranty, and not on the common counts.

*Mines vs. Sculthorpe*, 2 Camp., 215.
*DeColyar on Guaranties*, 226.

In this case the declaration contained the common counts, and it is clear that no recovery was possible on the special counts, and in an action against the sureties alone, it is equally clear they were not liable on an implied contract covered by the common counts, and it was error in the Court to permit the jury to consider evidence applicable to the common counts alone.

Another proof that the Court below lost all sight of the difference between a suit against Allen and one against his sureties was the omission to require proof of a *demand on Allen, and notice to his sureties* of his default, as a condition precedent to their liability to a suit. "A demand on the principal debtor and a failure on his part to do that which he was bound to do are required to found any claim against the guarantor and notice of the failure must be given to him."

*2 Parsons Conts.* 29.
*Douglass vs. Reynolds*, 7 Pet. 126.

The guaranty was *contingent* upon Haugh & Co. performing certain work. Those sureties were not bound to know that Haugh & Co. had entitled themselves by a performance, to any sum whatever from Allen, without notice.

*Dickerson vs. Derickson*, 39 Ills. 574.
*White vs. Walker*, 31 do. 422.
*Curtis vs. Hubbard*, 9 Metc. 322,
*Paige vs. Parker*, 8 Gray, 211.
*Lee vs. Dick*, 10 Peters, 496.

Under the circumstances, Haugh & Co. were bound also to pursue Allen, so that if these sureties paid a judgment they could be subrogated to a judgment against Allen.

*Noyes vs, Nichols*, 2 Williams. (Vt.) 159.
*Fuller vs. Loring*, 42 Me. 481.

But this action was also not maintainable on the special contract, because *premature.*

Looking at the contract with Haugh & Co. (transcript p. 10), we find that they were to be paid in "four equal payments as the work progresses, reserving 20 per cent. of each installment *until the completion of said building*, that is to say: When ¼ of said iron work shall be completed there shall be paid ¼ of the aforesaid sum of $9,150, less 20 per cent. of said ¼ and thereafter on the completion of each successive ¼ of said iron work there shall be paid a ¼ of the aforesaid sum of $ 9150, less 20 per cent of each ¼ until the whole iron work is completed, and *when said jail building shall be completed* the remainder of said sum of $9,150, including said reserved 20 per cent. shall be fully paid." (transcript 3.)

Now near $2,000 of this contract price was not demandable from Allen till the whole jail building was completed and accepted by the County, when Allen would receive his own pay. Upon what principle were the jury permitted to find a verdict for the whole amount of Allen's supposed liability, when the jail was but half finished and how when only ¼ of the iron work was completed after a sort, were the jury allowed to

anticipate the maturity of other instalments and render a general verdict upon a special contract. as if it had been fully performed, and all instalments due thereon had matured.

In conclusion then we urge that the evidence in this case makes it clear that Haugh & Co. could not have maintained an action on the special contract against Allen himself, having neither performed that contract, or shown any valid excuse for not performing it,—that if the action were maintainable on the special contract, it would be only for the installments actually due thereon,—that the action of the County authorities in deciding that the partition tendered was not in conformity to the plans and specifications was conclusive in the absence of fraud, which is not suggested, and that if it could have been reviewed that the evidence was overwhelming in support of the propriety of that action,—that if the suit were against Allen himself on a *quantum meruit*, the amount of the verdict was flagrantly excessive and evidently based on a false theory on the part of the jury of the extent of his liability, derived from the charge of the Court,—that these defendants as mere guarantors of payments not to fall due *absolutely* at *specified times*, but of payments to fall due at *indefinite periods*, *upon the contingency of performance of conditions* by Haugh & Co., were not liable to suit without notice of the performance of such conditions and of Allen's default averred in pleading, and proved on trial, even if an action were otherwise maintainable against them on the special contract —that evidence to establish the liability of these sureties under the common counts of the declaration was incompetent, and that they could be held on their guaranty only in a special action thereon and on *strict proof* of the performance by Haugh & Co. of the conditions of the written contract upon which Allen was to

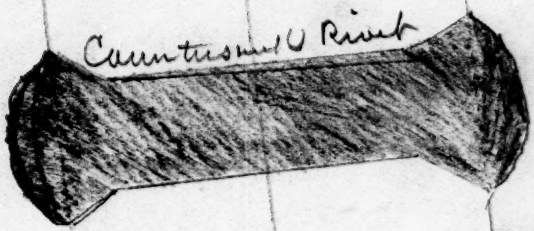
be liable to pay installments, and then only for such as were actually due, and after proper notice of such fact and of Allen's default.

Because these elementary principles governing the liability of guarantors under the circumstances shown, were ignored in the Court below, we insist that we are entitled to a new trial.

SLEEPER & WHITON,

*Attys. of Defs. in Error.*

Angle & Rivet required by the Contract. —




Angle & Rivet as prepared by Haugh & Co

IN THE

# SUPREME COURT

## OF THE UNITED STATES,

NORTHERN DISTRICT OF ILLINOIS,

SEPTEMBER TERM, A. D. 1875.

---

GILBERT WOODRUFF, et al., Plaintiffs in Error,

—*vs.*—

BENJAMIN F. HAUGH, et al., Defendants in Error.

---

# Brief and Argument for Defendants in Error.

*Jno. A. Jewett,*

Attorney for Defendants in Error.

Beach, Barnard & Co., Legal Printers, 98 Randolph Street.

1875.

IN THE

# SUPREME COURT OF UNITED STATES,

NORTHERN DISTRICT OF ILLINOIS,

SEPTEMBER TERM, A. D., 1875.

---

GILBERT WOODRUFF, ET AL.,
*Plaintiffs in Error,*
—*vs.*—
BENJAMIN F. HAUGH, ET AL.,
*Defendants in Error.*

} In Error to Circuit Court for Northern District of Illinois.

---

## BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

---


## JNO. N. JEWETT,

ATTORNEY FOR DEFENDANTS IN ERROR.


---


CHICAGO:

BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.

1875.

# Statement of the Case.

On the 18th day of July, 1871, the defendants in error entered into a contract with one John Allen, to "furnish the material "for, manufacture, deliver and erect, in its proper position, al "the wrought iron work," for a jail building, which said Allen had previously agreed to build, at Rockford, in Winnebago county, Illinois. For doing this, the defendants in error, composing the firm of Haugh & Co., of Indianapolis, Indiana, were to be paid by Allen the sum of $9,150, in four equal payments, as the work progressed; twenty per cent. of each installment to be reserved until the completion of the building.

The plaintiffs in error, at the time of the execution of said contract, by endorsement thereon, guaranteed the performance thereof on the part of said Allen, in the following language, to wit:

"In consideration of the making of the foregoing agreement, "by the said Benjamin F. Haugh, Joseph R. Haugh, and "Thomas H. Butler, we, Gilbert Woodruff, Horace Brown, "and George S. Haskill, of the city of Rockford, Illinois, do "hereby guarantee the faithful performance of the said agree-"ment on the part of said John Allen.

"Witness our hands this 18th day of July, A. D. 1871.

"GILBERT WOODRUFF.
"HORACE BROWN.
"GEO. S. HASKILL."

Under this contract, thus guaranteed by the plaintiffs in error, the defendants in error undertook to furnish the wrought iron work for the jail and had proceeded so far that the sheet iron lining of the building was all in place, a portion of the window frames were built into the wall, and nearly all the other iron work was upon the ground, ready to be put up, when they

were stopped, by the refusal of Allen to allow the material to be used, he claiming that it was not in accordance with the contract. As to this, the parties, of course, disagreed, the defendants in error contending that the material actually put up, and which remained permanently a part of the structure, and also that which they were ready to put in place, was in all respects substantially in accordance with the plans and specifications which were made a part of the contract, and as Allen refused to pay for any portion of the work, this litigation necessarily followed.

The declaration consists of three special counts, and the common counts. All the special counts set out the contract between Allen and the defendants in error, and the guaranty of the plaintiffs in error, either in *hæc verba*, or according to their legal effect. In the first two, it is alleged that the defendants in error had completed and erected in place, according to the contract, one-half of the entire work, and were ready and offered to complete the balance, but were wrongfully prevented from so doing by said Allen. In the third count, it is alleged that they had completed one-fourth part of the work, and were entitled to be paid one-fourth part of the contract price, less the 20 per cent.

To this declaration, there were pleaded the general issue, and five special pleas. A demurrer to all the special pleas was sustained by the circuit court. A trial was had before the court and a jury, upon the issue as thus made, which resulted in a verdict and judgment in favor of the defendants in error for the sum of $5,000, and costs.

The errors assigned upon the record, so far as they will be noticed by this court, relate entirely to the charge of the circuit judge to the jury, and in the absence of the brief of the learned counsel for the plaintiffs in error, I am compelled to assume that this assignment of errors will be adhered to by them.

# Brief and Argument.

I.

The contract price in this case was payable in installments. One-fourth of that price, less the reserve of 20 per cent., became absolutely due when one-fourth of the work was completed. This appears upon the face of the contract itself.

II.

The liability of the guarantors follows that of their principal, Allen. If, then, Allen agreed to pay in installments, the plaintiffs in error became liable to pay in the same manner, for their guaranty was that Allen should faithfully perform his contract according to its terms.

III.

A large portion of the work stipulated for in the contract was actually furnished and put in place by the defendants in error, and remained permanently a part of the building. This amounted to an acceptance of so much of the work, and as under the contract, changes in the specifications were provided for, it simply remained for the jury to estimate the value of the completed work thus accepted, and whether it was exactly in accordance with the plans and specifications, or not, it was still work done under the contract, for which the guarantors were liable.

IV.

As the contract, the performance of which, on the part of Allen, was guaranteed by the plaintiffs in error. did not bind the parties absolutely to the performance of the work according to the plans and specifications, but left them open for future modification, (see printed record, pages 12 and 13), the guarantors could not object that the work of the defendants in error, actually completed, and accepted by Allen, was not strictly in accordance with said plans and specifications, even if such was the fact.

V.

In this respect, the contract itself provides for a payment by Allen as upon a *quantum meruit*, and the guaranty covers Allen's agreement to pay, in that event, just as effectually as though the plans and specifications has been exactly followed.

VI.

As to the alleged error of the circuit court, in refusing to charge the jury as requested by the plaintiffs in error, it may be said that so much of the requests as were pertinent to the case, is contained in the charge as actually given. The charge of the court distinctly tells the jury that the plaintiffs in error are not liable upon their guaranty, "unless Allen is in default "upon his contract." (Printed Record, 36.) Whether Allen was in default, or not, was a question for the jury under the evidence. The charge of the court puts the case before the jury precisely as the evidence left it, in the following language, at page 38 of the printed Record: "The plaintiffs claim that "they proceeded according to the terms of their agreement, to "provide the materials and manufacture the iron work re-"quired, substantially in the manner called for by the plans "and specifications, the most of the work being done at the "plaintiffs' shop, in Indianapolis, and had proceeded to put the

" iron lining and five of the window frames in place, and were " ready to proceed to put the open work partition and cell " doors, and other parts of the work in place, when they were " stopped by said Allen and the building committee in charge " of the work. In fact, plaintiffs insist that they had sub- " stantially performed their contract, when they were stopped; " the work being then all, or substantially all, made, and ready " to be put in place.

" The defendants, besides interposing several technical, or, " rather, legal defences, arising out of what they claim to be " the law of the case, on the admitted facts, insist that the work " brought upon the ground, and offered to be put in place, did " not conform to the plans and specifications, and that the same " was, therefore, rightfully rejected by Mr. Allen and the build- " ing committee."

Then, after specifying several particulars in which the work was claimed to be deficient, the charge proceeds :

" For want of conformity to the specifications, mainly in those " particulars, which I have enumerated, and also by reason of " the imperfection of the workmanship, in several particulars, " Mr. Allen claimed the right to reject the work tendered by " plaintiffs, and it becomes your duty to determine, under the " law and the evidence, how far he was right in rejecting said " work."

The court further instructed the jury, in substance, that under the contract providing for changes, the acceptance of any portion of the work actually put in place, although not literally according to the plans and specifications, was equivalent to an agreement for such change. (Printed Record, 39.) And after pointing out the main objections to the open work partition offered to be put up by defendants in error, and which constituted the principal part of the work, not actually put in place, the court says, (page 40) : " You have heard the testi- " mony on all these points, and have had the plans shown and " explained to you, *and it is for you to say under the proof*, " whether this part of the work complied with the contract. If it " did not, then Mr. Allen was not bound to accept this partition " as part of the work under the contract, and had the right to for-

" bid plaintiffs from putting it up." Further on, the court adds: " The contract was an entirety, and the plaintiffs had no right " to put in the window frames, cell doors, &c., even if they com- " plied in all respects with the drawings and specifications, if " they, at the same time, insisted on putting in the partition " also, which did not conform to the plans. And if you believe, " from the evidence, that the plaintiffs insisted on putting in a " partition, which was not made according to the plans, then " they cannot recover for the doors and window frames not put " up and used, even though they may be properly con- " structed."

The whole charge taken together, it is insisted, placed the case before the jury in a fair and impartial manner, leaving it to them to determine, from the evidence, and as a question of fact, whether Allen's refusal to allow the defendants in error to proceed with and complete the work, was right or wrong, and whether the work done and tendered was or was not substantially in compliance with the contract between the parties. The requests of the plaintiffs in error, on the contrary, were one-sided, and partial, in some cases, assuming the existence of facts which were to be found by the jury, and ignoring the fact that the contract price was payable in installments, and that the contract itself provided for changes in the work, as it progressed, by agreement between the principal parties, and without referring such changes, in any way, to Allen's guarantors.

## VII.

If the very general exception taken to the charge of the court is such that this court can take notice of it, then, in reply to it, I say that it is evidently not well taken, inasmuch as it assumes that the finding of the jury, under the charge, cannot be sustained, except as a finding under the common counts, for work and labor, and materials furnished. This assumption is without foundation. The special counts allege the completion of a portion of the work, and a tender of the balance, according

to the contract, and a wrongful prevention of the completion of the work by Allen. Upon these counts, it was competent for the jury to assess damages to the full extent of the contract price, or to the full extent that the contract price was unpaid, less, perhaps, the actual cost of putting the balance of the work in place, for the reason that the performance of a contract in part, and a tender of performance as to the residue, is in law a complete performance of the entire contract, for the purposes of maintaining or defending an action on the contract.

*Smith* v. *Loomis*, 7 Conn., 110.
*Savary* v. *Goe*, 4 Wash. C. C., 140.
*Lamb* v. *Lathrup*, 13 Wend., 95.

## VIII.

If there was any error in the charge of the court, in that part repeated in the Record, and specially excepted to by plaintiffs in error, such error was in their favor, and cannot be taken advantage of by them to reverse the judgment. The main, if not the only, question in the case, as shown by the record, was, whether the defendants in error had performed and tendered performance of their contract according to its terms and spirit. If they had, (and that was a question for the jury), then they were entitled to full payment, less the further expense which would have been incurred in completing that part which was left unfinished; but in laying down the principles to govern the jury in making up their verdict, in case they should find for the defendants in error, the circuit court says, (Record, 40) :

"If you find, from the evidence, that the contract has been "partially performed by the plaintiffs, and that they have been "prevented from performing the remainder of the work, by "Mr. Allen, and that Mr. Allen has adopted or used a por- "tion of the work, such as the iron lining and five window "frames, then it will be your duty to ascertain, from the evi- "dence, the value of the work thus done and appropriated, and "the plaintiffs will be entitled to recover the value so found as

" damages; **but** you should deduct from the amount thus found " any sums due from plaintiffs to Allen, for advances, &c. * * * " Also any damages which Allen has sustained by reason of " the non-performance of said contract between plaintiffs and " Allen," &c.

That the jury followed this part of the charge, is apparent from the amount of their verdict, for the Record shows that Allen had only paid about $500 in advancing freight, and other small expenses, on account of the contract price of $9,150. It is respectfully insisted that in case the jury found, from the evidence, that the defendants in error had partially performed their contract, and were prevented by Allen from completing it, then the damages to which the defendants in error would have been entitled, was the value of the work actually provided and put in place, together with the proportionate expense incurred upon the unfinished portion of the work, less payments actually made to them; and that as Allen, in the case supposed, prevented the completion of the contract, he would not be entitled to any allowance of damages by reason of the failure of the defendants in error to perform the entire contract. The testimony showed, or tended to show, that all or nearly all of the material was on the ground, ready to be put in place, and that the defendants were then ready and offering to put it up, when the dispute as to the quality of the work arose, and the notice prohibiting them from putting it up was served upon them by or at the instance of Allen. If the failure of the defendants in error to complete the work was owing to the prevention of Allen, as this portion of the charge supposes, then, certainly, they could not be responsible for any damages which Allen may have sustained by reason of such failure. If, in charging the jury to the contrary of this, the circuit court inadvertently did injustice to the claims of the defendants in error, which cannot be denied, still the plaintiffs in error, who have had the benefit of the mistake, cannot, on that account, reverse the judgment, which, though less than it should have been, the defendants in error prefer to accept, rather than to continue litigation.

## IX.

Upon review of the entire record, I am unable to find any further questions which seem to require either argument or authority. The demurrer to the special pleas was rightfully sustained, for the reason that, in some of them, it was attempted to make a defense out of alleged modifications of the contract between Allen and the board of supervisors of Winnebago county, when such modifications were specially provided for in the contract with the defendants in error, the performance of which by Allen, the plaintiffs in error expressly guaranteed; and the others of said pleas amounted simply to the general issue, and, therefore, no advantage was lost to the plaintiffs in error, upon the trial, by the ruling of the court.

I am not aware that this court ever undertakes to revise the finding of the jury as to the amount of damages, or the discretion of the circuit court in its ruling upon a motion for a new trial. The practice is different in the Supreme Court of Illinois, and it is in view of that practice, I presume, that the counsel for the plaintiffs in error have drawn the fifth and sixth assignments of error attached to the record.

The whole case, as presented upon the record, was peculiarly one of fact for the jury to determine, and, believing that there was no error in the rulings and charge of the circuit court prejudicial to the plaintiffs in error, it is respectfully submitted that the judgment should be affirmed.

JNO. N. JEWETT,

*Att'y for Def'ts in Error.*

*No.* ..... *Agenda No.* .....

UNITED STATES

# SUPREME COUR

**Northern District of Illinois.**

SEPTEMBER TERM, A. D. 18

In Error to Circuit Court for Northern District of Ill

**GILBERT WOODRUFF, et a**
*Plaintiffs in*

—VS.—

**BENJAMIN F. HAUGH, et al.**
*Defendants in*

## Brief and Argument for Defendants in E

Filed .....

.....

Cl

**JNO. N. JEWETT,**
*Att'y for Defendants i*

Beach, Barnard & Co., Printers, 98 Randolph St., Chic